APPENDIX A.

Portion of Memoranda of Holdings of District Court dealing with the issue involved in this petition for certiorari (R. 298-299):

MOTIONS TO DISMISS.

Allegations re payment of dividends.

In the St. Johns case [*Aiken, et al.* v. *Insull, et al.*] this subject is covered by Paragraphs 41 to 45, inclusive, of the complaint. Paragraph 43 avers that on January 9, 1932, at a meeting of the Board (all present except two) a resolution was unanimously adopted ratifying, confirming and approving the action of the Executive and Finance Committees, directing the payment of a dividend to stockholders of record December 15, 1931, such dividend being payable January 2, 1932. Taking this allegation most strongly against the pleader, I assume that the ratification and approval of the Board was given seven days after the dividend had been paid. This obviously is an insufficient allegation to charge the directors because the wrong had been consummated before the action of the directors. (*Lewis* v. *Montgomery*, 145 Ill. 30; *Slater* v. *Taylor*, 241 Ill. 102.)

Paragraphs 44 and 45 allege that the company had no surplus at any time during the years 1929, 1930, 1931 and 1932, but paid cash dividends during each of these three years (which three I do not know); that the Board of Directors authorized or ratified the action of the Finance or Executive Committee, authorizing such payment of dividends. There are 15 defendants named in this suit and elsewhere in the complaint appears an allegation that each of the defendants was a member of the Board of Directors from January 14, 1929, to April 16, 1932. How many and which ones were present at the meeting where the action of the committee was ratified we are not told by the complaint.

The liability under the statute must be predicated upon the individual director having declared or assented to a dividend and it is not enough to say that the company or the board or the committee declared a dividend. It would be a dangerous theory of law if an individual director were to be held liable for some misfeasance or malfeasance related to his conduct as a director without the assertion of some fact to show wrong on the part of the specific director involved.

The allegations concerning payment of dividends in contravention of Section 23 of the 1919 Corporation Act are insufficient to charge any individual defendant with such responsibility. (*Lewis* v. *Montgomery, supra.*)

In the De Mets case the allegations on this subject are in part similar to the St. Johns case, but not quite so full as the St. Johns case, hence, likewise, obnoxious to the motion.

In view of the conclusion reached on this allegation of the complaint, it is unnecessary to pass upon the constitutionality of Section 23.

APPENDIX B.

Section 23 of the 1919 Illinois Corporation Act provided in full as follows:

> The directors shall jointly and severally be liable for the debts and contracts of the corporation in the following cases:
>
> (1) For assenting to an indebtedness in excess of the amount of the capital of the corporation, to the amount of such excess; *provided* no director shall be liable under this clause (1) of this section if at the time such indebtedness is incurred, the value of the assets of the corporation as a going concern is greater than the amount of such indebtedness, including in such assets the assets acquired with or resulting from the incurring of such indebtedness; but not including in such assets good will or any sum therefor.
>
> (2) For declaring or assenting to a dividend if the corporation is, or is thereby, rendered insolvent, or its capital is thereby impaired, to the extent of such dividend;
>
> (3) For debts contracted between the time of making or assenting to a loan to a stockholder or director and the time of its repayment, to the extent of such loan.
>
> For the purposes of this section the capital of the corporation shall be considered as the aggregate amount paid in on its shares of capital stock issued and outstanding.
>
> Unless a director was absent from the meeting at which such dividend was declared or loan made, or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto.

No. 823

FILED
DEC 30 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

SAMUEL INSULL, JR., et al.,
Cross-Petitioners,

vs.

THOMAS D. AIKEN, et al.,
Cross-Respondents.

Cross-Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

CROSS-PETITION.

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle St., Chicago,
Solicitors for Cross-Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

No. .....

SAMUEL INSULL, JR., et al., Cross-Petitioners, vs. **THOMAS D. AIKEN, et al.,** Cross-Respondents.	Cross-Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Cross-Petition for Writ of Certiorari.

To the Honorable the Supreme Court of the United States:

Samuel Insull, Jr., H. L. Stuart, Edward J. Doyle, George F. Mitchell, Philip J. McEnroe and Stuyvesant Peabody respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit directing that Court to certify to this Honorable Court the record in the case of *Thomas D. Aiken et al., Plaintiffs-Appellants,* v. *Samuel Insull, Jr., et al., Defendants-Appellees,* No. 7430 in that Court, in order that the decision and judgment of said Court rendered October 1, 1941, may be reviewed in so far as the Circuit Court of Appeals reversed the decree of the District Court for the Northern District of Illinois.

On this day, Thomas D. Aiken and others filed their petition for a writ of certiorari to said Circuit Court of

Appeals in this case accompanied by a transcript of the record from said Court seeking to have this Court review that portion of the decision and judgment of said Court which affirmed the decree of the District Court. These cross-petitioners will oppose the petition of Thomas D. Aiken and others on the ground that the Circuit Court of Appeals was right in so far as it affirmed the District Court.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. A., Sec. 347.) This cause originated in the United States District Court for the Northern District of Illinois and was reviewed on appeal by the United States Circuit Court of Appeals for the Seventh Circuit. The opinion of the Circuit Court of Appeals was filed August 22, 1941, but petitions for rehearing were filed and denied, and final judgment was rendered October 1, 1941. R. 351, 461.

Statement of the Case.

The complaint was filed February 3, 1933, in the names of twenty-nine holders of Series B Debentures issued by Insull Utility Investments, Inc. (hereinafter called "I. U. I.") on behalf of themselves and all other holders of such debentures similarly situated, and all other creditors who desired to join and share the costs and expenses of the suit. (R. 2.) When the complaint was filed it purported to allege five causes of action,—(1) an action for wrongful declaration of dividends in violation of statute, (Pars. 41-45) (2) an action for wrongful pledging of assets in violation of debenture covenants, (Pars. 23-40) (3) an action for improper use of corporate funds in settlement of claims, (Par. 46) (4) an action for purchasing securities in

deviation from the advertised purpose of the corporation, (Par. 47) and (5) an action for wrongful investment of funds in stock of Corporation Securities Co. of Chicago. (Pars. 21-22.) Plaintiffs (cross-respondents here) have abandoned all but the first two alleged causes of action.

In so far as the complaint relates to the alleged cause of action for declaration of dividends in violation of the Illinois statute, it alleges* that there was in force during the period involved Section 23 of the 1919 General Corporation Act of Illinois which provides that directors shall be jointly and severally liable for "declaring or assenting to a dividend" if the corporation is or is thereby rendered insolvent or its capital is thereby impaired (Par. 41); that on December 13, 1931, the liabilities of I. U. I. exceeded the "market value" of its assets, and that on that date and ever since the corporation was and has been insolvent (Par. 42); that on January 9, 1932, a resolution was adopted by the board of directors "ratifying" a reso-

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*41. During all of the period of the existence of Insull Utility Investments, Inc., there has been in full force and effect a certain statute of the State of Illinois known as Section 23 of the General Corporation Act, which is in words and figures as follows:

"The directors shall jointly and severally be liable for the debts and contracts of the corporation in the following cases:

(1) For assenting to an indebtedness in excess of the amount of the capital of the corporation, to the amount of such excess; provided no director shall be liable under this clause (1) of this section if at the time such indebtedness is incurred, the value of the assets of the corporation as a going concern is greater than the amount of such indebtedness, including in such assets the assets acquired with or resulting from the incurring of such indebtedness; but not including in such assets good will or any sum therefor;

(2) For declaring or assenting to a dividend if the corporation is, or is thereby, rendered insolvent, or its capital is thereby impaired, to the extent of such dividend;

(Footnote continued on pages 4 and 5)

lution of the Executive *and* the Finance Committees "authorizing and directing" the payment of a dividend on January 2, 1932 to stockholders of record on December 15, 1931, (Par. 43); that the corporation had no surplus at any time during the years 1929, 1930, 1931 and 1932, but the "corporation" paid cash dividends during each of these three years on its preferred stock, the exact amounts of which are unknown to plaintiffs (Par. 44); and that the "board of directors authorized or ratified" the action of the Finance *or* Executive Committee authorizing the payment of said dividends, thereby rendering "themselves" jointly and severally liable within the purview of the statute to the plaintiffs and all other creditors and holders of contracts of the company. Par. 45.

This case was presented to the District Court and is now before this Court as to the cause of action relating to alleged wrongful payment of dividends on the amended motion to dismiss filed by leave of court on October 18,

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(3) For debts contracted between the time of making or assenting to a loan to a stockholder or director and the time of its repayment, to the extent of such loan.

For the purpose of this section the capital of the corporation shall be considered as the aggregate amount paid in on its shares of capital stock issued and outstanding.

Unless a director was absent from the meeting of which such dividend was declared or loan made, or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto."

42. On December 13, 1931, the total liabilities of Insull Investments, Inc., exceeded the total fair market value of its assets, and that on that date and ever since that date the company was and has been wholly and irretrievably insolvent.

43. On January 9, 1932, at a meeting of the Board of directors held in Room 1700, 72 West Adams Street, Chicago, Illinois, at which meeting all of the directors were present except Martin J. Insull and John H. Gulick, a

1939, (R. 209,) the motion to require plantiffs' attorneys to show by what authority they commenced and are prosecuting this suit filed October 23, 1939, (R. 471,) and the second motion for summary judgment filed November 14, 1939. R. 284.

The amended motion to dismiss sets forth that the complaint does not state a cause of action for illegal payment of dividends for several reasons: (1) A suit under Section 23 of the old General Corporation Act of Illinois must be brought on behalf of *all* creditors, whereas this suit is brought on behalf only of B debenture-holders and such other creditors as elect to join and share the costs and expenses. (2) Said Section 23 is unconstitutional because it is beyond the power of the legislature to declare a *conclusive* presumption of fact, as this section purports to do in its last paragraph, which provides, "Unless a director was absent from the meeting at which such dividend was declared * * * or unless his dissent therefrom

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resolution was unanimously adopted, ratifying, confirming and approving certain actions of the Executive and Finance Committee, among them a resolution authorizing and directing the payment of the dividend of $1.39 per share on the Company's $5.50 Prior Preferred Stock, payable January 2, 1932, to stockholders of record December 15, 1931.

44. As hereinabove set forth, the Company had no surplus at any time during the years 1929, 1930, 1931 and 1932. Nevertheless, the company paid cash dividends during each of these three years on all classes of its Preferred Stock, the exact amounts of which cash dividends are unknown to the Plaintiffs.

45. The Board of Directors authorized or ratified the action of the Finance or Executive Committee authorizing the payment of dividends as set forth above, thereby rendering themselves jointly and severally liable, within the purview of the Statute of the State of Illinois, set forth above, to the plaintiffs, and all other creditors and holders of contracts of the Company.

shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto." (3) The Illinois statute is penal in character and will not be enforced in Federal equity courts. (4) The complaint does not contain the essential allegation that the defendants or any of them as directors of the corporation *declared* or *assented to* the payment of any dividend. (5) The complaint does not allege facts which show that the corporation was insolvent at the time any dividend was declared or that the payment of any dividend rendered the corporation insolvent or that such payment impaired its capital. R. 209-216.

The District Court dismissed the complaint as to this cause of action, basing its decision only on the ground of insufficiency of allegations to state a cause of action. (Opinion, R. 296; Decree, R. 321.) The Circuit Court of Appeals reversed the judgment of the District Court as to this cause of action and held that the complaint was sufficient. R. 357-360.

The amended motion to dismiss also challenges the sufficiency of the complaint on the ground that it fails to allege *facts* which show that the requisite jurisdictional amount is present. The only allegations as to amount involved appear in Paragraphs 4, 16 and 43. Paragraph 4 consists merely of the general statement that more than $3,000 is involved. (R. 3.) Paragraph 16 alleges merely the number of $1,000 debentures held by the several plaintiffs. (R. 19.) Paragraph 43 alleges that the Executive and the Finance Committees authorized and directed the payment of a dividend of $1.39 a share on the preferred stock outstanding December 15, 1931, (R. 34,) but there is no allegation how many shares of preferred stock were outstanding on that date and so there is no basis for computing the *amount* of the dividend authorized.

The Circuit Court of Appeals held, contrary to the record, that the complaint "discloses facts from which the amount of a paid dividend may be determined," and by reference to other pleadings and to a proposed amendment offered more than eight years after the occurrences out of which the cause of action arose, held that there was sufficient showing of jurisdictional amount. R. 362.

The amended motion to dismiss also charged that there was a collusive selection of non-resident plaintiffs to give an appearance of jurisdiction in the Federal Courts. (R. 209.) This ground was supported by the affidavit of defendants. (R. 217.) Plaintiffs answered that about two-thirds of the debenture holders who signed separate copies of a uniform contract employing attorneys to collect moneys due on their debentures were citizens and residents of States other than Illinois, and that about one-third of them were residents of Illinois; that the attorneys for this group decided to institute a suit against former directors of I. U. I. in the District Court of the United States for the Northern District of Illinois, and that the secretary of a committee incorporated to conduct litigation respecting recovery on the debentures, after consultation with the attorneys for the group, selected the names of those used as plaintiffs in the filing of this suit. (R. 247-249.) *No named plaintiff was consulted about the use of his name nor did any named plaintiff have any knowledge that he was being named as a plaintiff until after the suit was commenced.* The selection was entirely by residents of Illinois and by persons who had no legitimate interest in the cause of action. R. 480.

The District Court did not rule on the point except by its general order sustaining the motions to dismiss. (R. 321.) The Circuit Court of Appeals held that the facts appearing in the record do not constitute such collusion

as will cause the Federal courts to refuse to entertain the suit. R. 362.

The motion to require plaintiffs' attorneys to show by what authority they commenced and are prosecuting this suit against the former directors of I. U. I. was filed October 23, 1939, and was supported by affidavits showing that the defendants and their attorneys had only recently learned of the lack of authority of plaintiffs' attorneys and by affidavits showing that the named plaintiffs were selected without consulting them and that the suit was commenced without their knowledge. (R. 471.) Plaintiffs' attorneys answered that they had commenced this suit by virtue of the authority conferred upon them by written instruments signed by the several plaintiffs and particularly Paragraph 2 thereof. (R. 474.) This "uniform contract" is addressed to two law firms and the pertinent part reads:

"The Undersigned Hereby Employs You

1. To collect all moneys due upon the Insull Utility Investments, Inc., Debentures listed below the name of the undersigned.

2. To institute, prosecute, join and participate in any and all suits, actions and proceedings in the name of, or on behalf of, the undersigned and that you may deem advisable in furtherance of such collection, in any part of the world where such actions may be brought or may at any time be pending." R. 467.

The answer of plaintiffs' attorneys shows that the first twenty-four named plaintiffs were never formally notified of the commencement of this suit in their names and that there was mailed to the last named five by the incorporated committee a letter dated February 4, 1933, relating to an unidentified suit against former directors in which it is

stated: "It was necessary to file this suit yesterday and we take this means of notifying you that you have been selected as one of the twenty-nine plaintiffs pursuant to the authority granted the attorneys in paragraph 2 of the uniform contract with debenture holders." (R. 475.) *The attorneys admitted that they received no instructions from the named plaintiffs other than as set forth in said uniform contract.* (R. 475.) The chairman of the committee organized and incorporated to conduct this litigation testified that he had no knowledge of the manner of the selection of the plaintiffs and had no instructions from any of them. (R. 483.) The secretary testified that not one of the plaintiffs in whose names this suit was brought ever conferred with the attorneys of the committee or with any member of the committee and that he handpicked the twenty-nine named plaintiffs from the 953 non-resident debenture-holders who had signed contracts with the attorneys pursuant to mail solicitation. (R. 480.) This secretary was a resident of Illinois and was not a debenture-holder when suit was commenced. (R. 477.) The charter says the committee is incorporated to maintain an organization "for the purpose of taking all necessary or proper steps to obtain for such debenture holders the maximum recovery on their debentures." (R. 479.) The complaint is not signed by plaintiffs but is signed by one who says he is their agent. R. 38-39.

The District Court overruled this challenge to the authority of plaintiffs' attorneys (R. 321) and the Circuit Court of Appeals affirmed this ruling. R. 362.

November 14, 1939, a motion for summary judgment was filed asking for an order barring prosecution of this suit against present defendants because of the settlement with and release of four other defendants. (R. 284-285.) The plaintiffs answered that this settlement was effected by covenants not to sue and that no one was released thereby.

(R. 242-246.) The instruments of settlement were signed by Attorney Jacobson pursuant to authority given him under the uniform contract to *compromise and settle* the claims of the debenture-holders. (R. 271.) The suit was dismissed as to the four defendants upon the payment of $50,000. (R. 64-65.) The complaint charged these released defendants with exactly the same acts as are charged against present defendants.

The Contested Issues.

As to the matters presented by this cross-petition the following questions arise and are in issue:

(a) Whether the attorneys appearing for plaintiffs had authority to commence and prosecute this suit.

(b) Whether named plaintiffs were collusively selected to confer on the District Court jurisdiction which it could not otherwise have.

(c) Whether the facts alleged show that the necessary jurisdictional amount is involved.

(d) Whether the complaint alleges facts which state a cause of action against these cross-petitioners for declaring and assenting to the payment of dividends in violation of Section 23 of the 1919 General Corporation Act of Illinois.

(e) Whether said Section 23 is constitutional.

(f) Whether this alleged cause of action for illegal payment of dividends can be maintained on behalf only of such creditors as join in the proceeding and share the costs and expenses thereof;

(g) Whether plaintiffs can maintain this suit in the absence of an allegation that they owned the debentures when the alleged wrongs were committed.

(h) Whether the District Court properly denied the filing of the proffered amendments to the complaint.

(i) Whether the cause of action was released by the settlement with four alleged joint wrongdoers.

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in conflict with applicable decisions of the Supreme Court of Illinois.

(a) Under the established law, this suit must be dismissed because the complaint was filed without the knowledge or authority of the plaintiffs and so the suit was never legally commenced. *Frye* v. *County of Calhoun*, 14 Ill. 131; *Town of Kankakee* v. *Kankakee & Indiana R. Co.*, 115 Ill. 88, 92; *Bell* v. *Farwell*, 189 Ill. 414, 417.

(b) When the Circuit Court of Appeals held that "the word 'assenting' includes the approval and ratification of a dividend after it has been declared," it held squarely against the Supreme Court of Illinois which has decided that "assenting" as used in the Corporation Act means assenting to the creation of indebtedness, which corresponds to the declaration of a dividend, and that a recognition of an indebtedness after it has been contracted, and so of a dividend after it has been declared, does not have the effect of charging a director with the statutory liability. *Lewis* v. *Montgomery*, 145 Ill. 30, 47.

(c) The Circuit Court of Appeals also decided contrary to the Illinois law when it held that the Executive Committee of I. U. I. was the agent of the board of directors in the declaration of dividends. *Lewis* v. *Montgomery*, 145 Ill. 30, 46.

(d) The holding of the Circuit Court of Appeals that the settlement with four of the defendants did not release all of the defendants charged jointly with the same wrong is contrary to the established law of Illinois. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151; *City of Chicago* v. *Babcock*, 143 Ill. 358, 366; *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312; *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Vigeant* v. *Scully*, 35 Ill. App. 44, 47.

2. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of Federal law in conflict with applicable decisions of this Court and with its own decisions and with decisions of other Circuit Courts of Appeals.

(a) The record shows that none of the debenture-holders who were non-residents of Illinois had any knowledge of the selection of the named plaintiffs or of the commencement of this suit until after the suit had been commenced and that the non-residents whose names were used as plaintiffs were handpicked by a resident of Illinois, who was not a debenture-holder, under the direction of the attorneys who appear for plaintiffs, with the sole purpose of conferring jurisdiction on a Federal court in violation of the rule stated in *Southern Realty Investment Co.* v. *Walker*, 211 U. S. 603; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181; *Quincy* v. *Steel*, 120 U. S. 241, 248; *Cashman* v. *A. & S. Canal Co.*, 118 U. S. 58, 61; *Detroit* v. *Dean*, 106 U. S. 537, 541; and *Cerri* v. *Akron-People's Telephone Co.*, 219 Fed. 285.

(b) Under the facts shown by this record, plaintiffs' attorneys commenced this suit against the former directors of I. U. I. without the knowledge or the authority of the named plaintiffs and under the

rule stated in *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, 319, and *Sutherland* v. *International Ins. Co.*, 43 Fed. (2nd) 969, 972, this suit must be dismissed.

(c) The construction placed on Section 23 of the 1919 General Corporation Act of Illinois by the Circuit Court of Appeals in this case extends the statute by construction to embrace cases not within its terms contrary to the decision of the same Circuit Court of Appeals in *White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.*, 268 Fed. 525, 527.

(d) Since the original complaint did not state a cause of action with respect to improper payment of dividends, the new cause of action alleged in the proposed amendments, if a cause of action is alleged, is barred by the Statute of Limitations. *N. & G. Taylor Co.* v. *Anderson*, 275 U. S. 431, 439; *Allis-Chalmers Manufacturing Co.* v. *City of Chicago*, 297 Ill. 444; *Board of Education* v. *Blodgett*, 155 Ill. 441.

(e) The District Court ruled in accordance with the established practice in denying amendments offered seven years after the suit was commenced and about nine years after the occurrences out of which the alleged cause of action arose. *National Bank* v. *Carpenter*, 101 U. S. 567, 568; *United States* v. *First Wisconsin Trust Co.*, 92 Fed. (2nd) 840, 844.

(f) The law is established that the requisite jurisdictional amount must affirmatively and distinctly appear from the allegations of the complaint and that a defect in such allegations cannot be helped by presumptions or argumentative inferences drawn from the complaint. There is no allegation in the complaint at bar of the amount of any dividend paid nor are there facts alleged from which the amount may be determined. The decision in this case is contrary to the rule in *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed.

(2nd) 753, 754; *Smith* v. *McCullough*, 270 U. S. 456, 459; *Norton* v. *Larney*, 266 U. S. 511, 515; and *Hanford* v. *Davies*, 163 U. S. 273, 280.

(g) Since plaintiffs have not by their allegations shown that the alleged wrongs occurred while plaintiffs were the owners of debentures, they cannot maintain this suit. *Graham* v. *Railroad Co.*, 102 U. S. 148, 153; *Chicago Daily News Co.* v. *Siegel*, 212 Ill. 617, 629.

(h) The Circuit Court of Appeals was in error when it used plaintiffs' other pleadings and proposed amendments to bolster up the original complaint. It is established that on motion to dismiss all doubts with respect to the sufficiency of the complaint must be resolved against the plaintiff. *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Lyons* v. *Reinecke*, 10 Fed. (2nd) 3, 7; *United States* v. *Linn*, 42 U. S. 104, 111.

Respectfully submitted,

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South La Salle Street, Chicago,
Solicitors for H. L. Stuart, Samuel Insull, Jr., Edward J. Doyle, George F. Mitchell and Philip J. McEnroe.

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle Street, Chicago,
Solicitors for Stuyvesant Peabody.

ARGUMENT IN SUPPORT OF CROSS-PETITION.

I.

The complaint did not state a cause of action against the defendants for alleged wrongful payment of dividends.

We present this point first because it is the ground on which the District Court dismissed the complaint as to the alleged cause of action against the former directors of Insull Utilities Investments, Inc. for declaring or assenting to the payment of a dividend in violation of Section 23 of the General Corporation Act of Illinois of 1919, which was repealed by the Business Corporation Act of Illinois of 1933. We shall undertake to show that the holding of the District Court is in line with the established law of Illinois as declared by the Supreme Court of Illinois and the Federal courts of the Seventh Circuit.

The only specific allegations with respect to the declaration of or the assenting to dividends are that "the board of directors authorized or ratified" the action of the Finance *or* the Executive Committee declaring dividends. (Par. 45.) This is far from alleging that any present defendant, *acting as a director,* "declared or assented to a dividend" within the meaning of the old Illinois statute. The only specific reference to a meeting of the board of directors is to the one held on January 9, 1932, where it is said a resolution was adopted "approving and ratifying" a resolution of the Executive *and* Finance Committees "authorizing and directing" the payment of a dividend on January 2, 1932, to stockholders of record December 15, 1931. (Par. 43.) It does not appear from these

allegations whether the dividend was authorized or directed by the Executive Committee or by the Finance Committee or by both, nor does it appear whether the dividend had already been paid at the time of the alleged action by the board of directors. Presumably, the dividend was paid January 2, 1932, and so the "approving and ratifying" by the board of directors a week later was certainly not a "declaring or assenting to a dividend" which is the only act which fixes the liability under the statute.

We here point out that neither cross-petitioner Peabody nor McEnroe nor Doyle nor Mitchell were members of the Finance Committee and only Doyle of this group was a member of the Executive Committee. Cross-petitioners Insull and Stuart were members of both committees. (R. 5-6.) But there is no allegation that either Insull or Stuart was present at any meeting of the Finance Committee where a dividend was declared or that either Insull or Stuart or Doyle was present at a meeting of the Executive Committee where a dividend was declared. The Finance Committee consisted of five members (Par. 10) and the Executive Committee consisted of seven members, (Par. 9) and *the action may have been taken by either committee by a majority which did not include any of cross-petitioners.* As Judge Briggle found, (R. 297,) no present defendant is definitely charged with any act in declaring or assenting to the dividend.

We deem the failure to allege that any of the present defendants (cross-appellants here) ever declared or assented to the payment of a dividend is conclusive against the sufficiency of the complaint. The offense penalized by the statute is the participation in the wrongful declaration of a dividend at the time it is declared. Ratification is not made actionable. In *Lewis* v. *Montgomery,* 145 Ill. 30, the Illinois Supreme Court squarely ruled that "assenting"

meant approval at the time of the action and not subsequent ratification. There it was sought to hold directors liable for recognizing indebtedness that had been created by the general manager of the corporation in alleged violation of the statute. The Court said (p. 47):

> "The liability is created only where the indebtedness of the corporation exceeds the amount of the capital stock, and is imposed only upon the directors and officers assenting to such excess of indebtedness. This plainly means assenting to its creation. Manifestly, a recognition of the indebtedness by the directors after it has been so contracted as to become binding upon the corporation, should not have the effect of charging them with this statutory liability."

When the Circuit Court of Appeals holds that "the word 'assenting' includes approval and ratification of a dividend after it has been declared", (R. 359,) it holds squarely contrary to the Supreme Court of Illinois which has decided that "assenting", as used in Section 23 means assenting to the creation of the liability and that a recognition of the obligation of the corporation by the directors after it has been contracted by another agent does not have the effect of charging the directors with the statutory liability. The Circuit Court of Appeals held in an earlier case that this statute should not be extended by construction to embrace cases not within its terms. (*White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.*, 268 Fed. 525, 527.) It is generally held by the courts, under similar statutes, that mere *ratification* of an improper dividend is not sufficient to create the statutory liability. *Western Mortgage & Guaranty Co.* v. *Grey,* 215 Calif. 191, 8 Pac. (2nd) 1016, 1020; *Watkinson* v. *Adams,* (Okla.) 103 Pac. (2nd) 498, 500.

The Circuit Court of Appeals reasons from the premise that the executive committee of a corporation is the agent

of the board of directors, whereas the Illinois Supreme Court holds squarely opposite in *Lewis* v. *Montgomery,* 145 Ill. 30, saying at p. 46:

> "The directors, though the governing body of the corporation, are only its officers and agents, and any subordinate agent appointed by them, or acting by virtue of their sufferance or recognition, does not thereby become their agent, but the agent of the corporation. His acts are the acts of the corporation, so as to make it liable for debts or obligations incurred by him on its behalf, but they are not the acts of the directors, unless commanded or authorized by them."

There is no allegation that the acts of the executive committee were commanded or authorized by cross-petitioners. The allegations are merely that the board of directors acquiesced in the declaration of a dividend by the executive committee by resolution adopted after the dividend had been declared and paid. R. 34.

Another defect in the complaint that is fatal to the maintenance of this suit by present plaintiffs is that *it is nowhere alleged that they were creditors of the corporation at the time the dividends were declared and paid.* (*Graham* v. *Railroad Co.* 102 U. S. 148, 153; *Chicago Daily News Co.* v. *Siegel,* 212 Ill. 617, 629; *Buell* v. *Lanski,* 232 Ill. App. 500, 511.) Whether they extended credit to the corporation before the dividends were declared or whether they bought their debentures in the open market after the alleged wrong had been done does not appear from the allegations of the complaint. If they bought their debentures *after* the dividends were paid they cannot now sue for alleged wrongs which caused them no legal injury. Courts do not countenance speculation by litigation.

The complaint was filed February 3, 1933 and it is alleged (Par. 16, R. 19) that on that day plaintiffs were the

"owners and holders of debentures." It is not alleged and cannot be inferred that such ownership existed on any day other than that alleged. The only other paragraph which could be contended refers to a date of purchase is paragraph 13 (R. 11-12), but when all of the paragraph is read it is clear that there is no allegation that the named plaintiffs bought their debentures from I. U. I. January 1, 1930 and paid the face amount therefor. It is true that it is alleged in the first part of the paragraph that plaintiffs are part of the public to whom the debentures were issued, but it is alleged by the same sentence that I. U. I. received pay for the debentures from the *underwriters* and that $4,818,000 of said debentures have been paid and cancelled since they were issued. If it can be said that there is an allegation in this paragraph that any plaintiff bought debentures from the underwriters in January 1930, there is no allegation that the debentures mentioned in paragraph 16 are the debentures bought at the time of the original issue, three years before this suit was commenced. The debentures then bought may have been among those subsequently paid and cancelled and those plaintiffs owned at the time this suit was filed may have been debentures acquired after the dividends were declared and paid. All uncertainties and ambiguities in the complaint must be resolved against the plaintiffs.

The liability under Section 23 is personal to the creditors and a suit to enforce the liability must be brought by one or more creditors on behalf of *all* creditors. (*Ryerson & Son* v. *Peden,* 303 Ill. 171, 184; *Seegmiller* v. *Day,* 249 Fed. 177, 179; *Pollard* v. *Bailey,* 20 Wall. 520, 527.) This suit is brought by plaintiffs on their own behalf as holders of B Debentures of I. U. I. and on behalf of all other owners and holders of such debentures similarly situated and all other creditors who desired to join in the suit and share the costs and expenses thereof. (R. 2.) The Circuit Court

of Appeals is in error when it says that "This suit was brought on behalf of all creditors." (R. 361.) Plaintiffs do not sue on behalf of the A debenture-holders except as they are included among other creditors, and then they are not included unless they join in the proceeding and make themselves liable for costs and expenses of this suit. No A debenture-holder ever joined. When this suit was filed the banks and others besides debenture-holders had claims aggregating some $70,000,000. We think it is clear from the allegations of the complaint that it was never intended by plaintiffs to include the banks as their co-plaintiffs. Since this suit was not brought on behalf of all creditors, it cannot be maintained as a suit under the Illinois statute.

Section 23 imposes liability "for declaring or assenting to a dividend if the corporation is, or is thereby rendered insolvent, or its capital is thereby impaired, to the extent of such dividend." No facts are alleged in this complaint which show that the corporation was insolvent at the time any dividend was declared or that the payment of the dividends rendered the corporation insolvent or that such payment impaired its capital. The complaint does not set forth the capital of the corporation, its assets and liabilities are not stated, and the dates of payments or amounts of dividends paid are not alleged. The allegations with respect to the financial condition of the corporation (Pars. 20, 29, 42, 44) are mere conclusions of the pleader and are not allegations of fact which show that the corporation could not legally pay dividends. There are no allegations with respect to any dividend except the last which was paid January 2, 1932. As to this last dividend the allegation in Paragraph 42 that on December 13, 1931, the total liabilities exceeded the total "fair market value" of its assets is not an allegation that the *actual* value of the assets, which were stocks of other corporations, did not exceed the liabilities of this investment company. Further-

more, since this last dividend was declared by the Executive Committee on December 4, 1931, the condition of the corporation on December 13, 1931, would not of itself be sufficient to charge these cross-petitioners as directors with the statutory liability, especially when it is alleged the board did not act until January 9, 1932. There is a complete lack of allegation of essential facts to show either insolvency or impairment when any dividend was declared or assented to by any cross-petitioner in any capacity.

The complaint nowhere alleges facts which show that any of the cross-petitioners knew that the corporation was not in financial condition to pay any of the several dividends. The complaint reveals that the books of the corporation showed a surplus by reason of income from dividends on the stocks held in the portfolio of the company and by reason of the proceeds of the sale of subscription rights. Such of the directors, if any, as the complaint shows assented to the payment of a dividend had the right to rely on these books. *Chick* v. *Fuller,* 114 Fed. 22, 29.

If this action for improper payment of dividends were brought on behalf of all creditors of the corporation and the complaint otherwise alleged a case within the terms of the statute and these plaintiffs (cross-respondents here) were in position to maintain the suit, it could not be maintained because the statute on which it is based is unconstitutional. The last paragraph of the statute provides, "Unless a director was absent from the meeting at which such dividend was declared, * * * or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto." It is beyond the power of the legislature to declare a *conclusive* presumption. Such an attempt is an invasion of the judicial field and violates Section 2 of Article II and Article III of the State Constitution and the Fourteenth Amendment to the Federal Constitution. (*Carolene Products Co.* v. *Mc-*

Laughlin, 365 Ill. 62, 70; *People* v. *Rose*, 207 Ill. 352, 361; *Hall* v. *Woods*, 325 Ill. 114, 144; *Heiner* v. *Donnan*, 285 U. S. 312, 329.) This provision of Section 23 creating a conclusive presumption being unconstitutional, it follows that subdivision 2 of this section of which this invalid provision is an essential and integral part, is likewise invalid. (*Chicago Motor Club* v. *Kinney*, 329 Ill. 120, 134; *Springfield Gas Co.* v. *Springfield*, 292 Ill. 236, 243.) The Supreme Court of Illinois decided, under the Illinois Corporation Act prior to the revision thereof in 1919, that a director could only be held liable for the violation of the statute when the evidence showed that he had consciously approved or participated in the wrongful act, (*Lewis* v. *Montgomery*, 145 Ill. 30,) and the Federal courts in Illinois gave this statute the same construction. (*White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.*, 268 Fed. 525; *Chick* v. *Fuller*, 114 Fed. 22, 29.) The very purpose of the addition of the conclusive presumption clause in 1919 was to change this rule of evidence.

The provision of Section 23 under consideration is a penal statute. It in effect *prohibits* declaration of a dividend which will render the corporation insolvent or which will impair the capital of the corporaton. It *punishes* directors for violation of their duties to the corporation and its stockholders and creditors. (*Vestal Co.* v. *Robertson*, 277 Ill. 425, 430; *Patterson* v. *Thompson*, 86 Fed. 85, 86.) Inasmuch as liability sought to be created by the section is penal in character, a suit cannot be maintained in equity to enforce such liability. (*Loverin* v. *McLaughlin*, 161 Ill. 417, 435; *Robson* v. *Doyle*, 191 Ill. 566, 570.) The Federal courts will not enforce a penal law of Illinois. *Gwin* v. *Breedlove*, 43 U. S. 29, 37; *Sherman* v. *Gassett*, 4 Gil. 521.

For all these reasons the District Court properly dismissed the complaint as to the cause of action for wrongful payment of dividends. While it based its decision only on

the ground of insufficiency of the complaint to state a cause of action, the decree will be sustained if any ground appearing of record is sound. The Circuit Court of Appeals erred in holding the original complaint sufficient and in reversing the decree of the District Court.

We respectfully submit that under the authorities the District Court properly refused the amendment to the complaint not only because it was presented too late, (*National Bank* v. *Carpenter*, 101 U. S. 567, 568; *L. E. Whitham Construction Co.* v. *Remer*, 105 Fed. (2nd) 371,) but also because it failed to state a cause of action. (*Lewis* v. *Montgomery*, 145 Ill. 30, 47.) The allowance of an application to amend rests in the discretion of the trial court and its order denying the application will not be reversed unless there is an abuse. *United States* v. *First Wisconsin Trust Co.*, 92 Fed. (2nd) 840, 844; *Davis* v. *Virginia Ry. & Power Co.*, 229 Fed. 633, 639.

These defendants filed their motions to dismiss in 1933 (R. 39, 43, 46) and plaintiffs had the case continued generally in 1934. (R. 57-58.) In 1939 defendants took steps which stirred plaintiffs to action in this case which they had permitted to lie dormant for more than six years. The proposed amendments were offered March 1, 1940 (R. 299), more than seven years after the complaint was filed. The District Court ruled in accordance with established practice regarding tardy amendments. The Circuit Court of Appeals ruled directly contrary to the spirit of the established law as well as the new Federal Rules of Civil Procedure which stress dispatch of business of the courts and require diligence on the part of litigants. Since the original complaint did not state a cause of action, the new cause of action alleged in the amendments, if a cause of action is alleged, is barred by the Statute of Limitations. (*N. & G. Taylor Co.* v. *Anderson*, 275 U. S. 431, 439; *Allis-Chalmers Co.* v. *City of Chicago*, 297 Ill. 444, 449.) Under Illinois law this com-

pleted bar is a vested right which is protected by the Constitution. *Board of Education* v. *Blodgett,* 155 Ill. 441, *Hanley* v. *Waters,* 255 Ill. App. 239.

II.

The complaint fails to allege facts which show that the requisite jurisdictional amount is involved.

The only paragraphs of the complaint relating to amount involved are paragraphs 4, 16 and 43. Paragraph 4 consists merely of the general statement that more than $3,000.00 is involved (R. 3). Paragraph 16 alleges merely that the plaintiffs are the holders of debentures in varying amounts (R. 19). The allegation in paragraph 43 is that a committee directed payment of a dividend of $1.39 a share on the preferred stock outstanding December 15, 1931 (R. 34) but there is no allegation of how many shares of preferred stock were outstanding on that date, and so there is no basis for computing the amount of the dividend authorized or paid. The Circuit Court of Appeals is in error when it says that the complaint "discloses facts from which the amount of a paid dividend may be determined." R. 362.

It is not enough that a complaint contains a formal allegation of jurisdictional amount. It must allege facts showing that the amount in controversy exceeds $3,000.00. *Smith* v. *McCullough,* 270 U. S. 456, 459; *Norton* v. *Larney,* 266 U. S. 511, 515; *Mutual Life Ins. Co.* v. *Thompson,* 27 Fed. (2nd) 753, 754. It must affirmatively and distinctly appear from the facts alleged and not by inference or argument that the necessary amount is involved. *Hanford* v. *Davies,* 163 U. S. 273, 280; *Wolfe* v. *Hartford Life & Annuity Ins. Co.,* 148 U. S. 389.

We respectfully submit that the Circuit Court of Appeals is in error when it uses "plaintiffs' counter motions, answers on facts and proposed amendments" to bolster up the original complaint. (R. 362.) It is well established that on a motion to dismiss all doubts with respect to the sufficiency of the complaint must be resolved against the plaintiffs. *Mutual Life Ins. Co.* v. *Thompson,* 27 Fed. (2nd) 753, 754; *Lyons* v. *Reinecke,* 10 Fed. (2nd) 3, 7; *United States* v. *Linn,* 42 U. S. 104, 111. Plaintiffs cannot supply deficiencies in their complaint by the affidavit of Mr. Jacobson as to the amount of any dividend that was paid. It is essential that the complaint itself set forth sufficient facts to show the necessary jurisdictional amount. This it does not do. It states, (par. 44, R. 34) "the exact amounts of which cash dividends are unknown to plaintiffs". On this ground of failure to allege facts as to amount involved to show jurisdiction in a federal court the complaint was properly dismissed.

III.

The plaintiffs were collusively selected to create an appearance of diversity of citizenship which does not in fact exist.

The Circuit Court of Appeals says "The record presents a situation where certain creditors having a justifiable interest in the controversy agreed that several members of their class would cause the suit to be commenced in order to confer federal jurisdiction." (R. 362.) If the record supported this statement of fact then *New Albany Waterworks* v. *Louisville Banking Co.,* 122 F. 776, 779; *Hutchinson Box Board and Paper Co.* v. *Van Horn,* 299 F. 424, 429 and *Matter of Reisenberg,* 208 U. S. 90, 111, would be in point. But it does not and the cases do not support the Court's conclusion.

In the cases cited by the Court the parties who were actually interested in the alleged cause of action agreed among themselves to cause the suit to be commenced in the name of and carried on by some of their number for the benefit of all. There the interested litigants selected the named plaintiffs so that diversity of citizenship would appear between the plaintiffs and the defendants, and it is held under those circumstances that this did not constitute such collusion as would cause the federal courts to refuse to entertain the suits.

In the case at bar the record establishes without dispute that *none of the debenture holders who were non-residents of Illinois had any knowledge of the selection of the named plaintiffs, or of the commencement of this suit until after the suit had been commenced.* In their answer to this point of the verified amended motion to dismiss, the attorneys for plaintiffs admit that one-third of the group that had employed them to collect the amount due on the debentures held by the members of the group were citizens of Illinois (R. 247); that each member of the group signed a separate copy of the uniform contract under which the attorneys were employed (for form see R. 467); that the attorneys, not the debenture holders, decided to institute the suit in the federal courts (Rec. 248); and that the secretary of the incorporated litigating committee, not the debenture holders, after consulting with said attorneys, selected the names of the plaintiffs from the non-resident signers of the contracts for the purpose of filing this suit in the Federal court (R. 249). On the hearing the secretary of this corporation admitted that not one of the plaintiffs in whose names suit was brought ever conferred with the attorneys who claimed to represent plaintiffs or with any member of the committee that assumes to speak for plaintiffs, or with the secretary of this incorporated committee, that made the selection of plaintiffs from citizens outside of Illinois.

(R. 480.) All of the officers of this Illinois corporation, organized to conduct litigation, were residents of Illinois. Not even the plaintiffs had anything to do with their selection, and not even they knew anything about the filing of the complaint until after it had been filed. (R. 481.) The chairman of this litigating committee testified that he had no contact with any of the non-resident members of the committee relative to the filing of this suit, that he had nothing to do with the selection of the persons whose names were used as plaintiffs, and that the first time he learned how they were selected was on the hearing in the District Court seven years after the suit was commenced. R. 483.

These admitted facts bring the case squarely within the rule stated in *Southern Realty Investment Co.* v. *Walker*, 211 U. S. 603; *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181; *Quincy* v. *Steel*, 120 U. S. 241, 248; *Cashman* v. *A. & S. Canal Co.*, 118 U. S. 58, 61; *Detroit* v. *Dean*, 106 U. S. 537, and *Cerri* v. *Akron-People's Telephone Co.*, 219 Fed. 285. These suits were dismissed because of collusion to create an appearance of diversity of citizenship.

We respectfully submit that there is no basis in the record for the finding of the Circuit Court of Appeals that the creditors agreed that certain members of their class would cause this suit to be commenced. (R. 362.) The undisputed evidence is that the non-resident creditors were not consulted about the commencement of the suit and knew nothing about its commencement until after the complaint had been filed. (R. 480.) On the hearing one of the plaintiffs' attorneys frankly admitted to the Court that the selection of the persons to be used as plaintiffs was made under the direction of the attorneys from the debenture holders who were not residents of Illinois in order that jurisdiction might be conferred on the Federal Court (R. 484) and he also admitted that the attorneys had had no consultation with the non-resident creditors respect-

ing the filing of this suit against former directors or the use of their names as plaintiffs prior to the commencement of the suit. (R. 487.) They assumed to act under the authority granted by the Uniform Contracts which by the very terms thereof gave no such authority.

"When the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed." *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 181. This collusive selection of plaintiffs is alone a sufficient ground for the dismissal of this suit. True diversity of citizenship is not present and there is no jurisdiction in the Federal courts.

IV.

Plaintiffs' attorneys failed to sustain the burden of showing that they had authority to commence this suit against former directors of I.U.I. A suit commenced without authority cannot be prosecuted even where plaintiffs ratify the commencement of the suit.

Plaintiffs' attorneys in their answer to the rule to show their authority, state that they commenced this suit by virtue of authority conferred on them by the Uniform Contract, separate copies of which were signed by some 953 non-resident debenture holders and 534 debenture holders residing in Illinois. (R. 474.) Paragraph 1 of this contract employs them "to collect all moneys due upon the Insull Utility Investments, Inc. Debentures listed below the name of the undersigned." (R. 467.) Paragraph 2, on which they particularly rely, authorizes the attorneys to participate in any suit that they "may deem advisable in furtherance of such collections." R. 467.

The debentures were contracts between the holders and the corporation. The directors were not parties to the debentures and there was no privity of contract between the holders and the directors. These attorneys were employed only to further the collection of moneys due upon the debentures and this is a far cry from giving them authority to sue the former directors for some supposed cause of action for alleged wrongful payment of dividends. If an attorney were employed to bring an action on a note no one would assume that he had authority to bring a penal action against some person who was not a party to the note.

There is a presumption that an attorney has the authority to commence a suit, but when that authority is put in issue, the burden is on the attorney to show his authority. This is nothing but elementary law of agency. A court may at any time require an attorney to show his authority to appear for a client. *Pueblo of Santa Rosa* v. *Fall,* 273 U. S. 315, 319; *Bell* v. *Farwell,* 189 Ill. 414, 419-424; *Town of Kankakee* v. *Kankakee & Indiana R. Co.,* 115 Ill. 88, 92.

A complaint filed by an attorney without authority is not the commencement of a suit. Where the power of the Court is illegally called into exercise the plaintiff cannot give life to the void act of the attorney by thereafter approving what the attorney has already done without authority. A defendant cannot be made to answer a suit illegally commenced. This point is squarely decided in *Frye* v. *County of Calhoun,* 14 Ill. 131, where the Court says (p. 133):

> "The process of the courts is not to be issued except at the instance of a suitor. It must be demanded by him in person, or by his authorized attorney. A defendant is not bound to answer to the merits of a suit commenced without authority from the plaintiff. Otherwise, he might be twice compelled to litigate the same cause of action. A judgment in his

favor in a suit prosecuted without authority, would be no bar to a second action brought by the direction of the plaintiff.

"The fact that some of the judgment creditors subsequently approved of this unauthorized act of the solicitor, does not change the legal character of the case. *The true question is, Whether he had authority at the time to commence the suit for them, and not whether they afterwards approved of what he had done.* The power of the court was illegally called into exercise by him, and the law will not suffer them to profit thereby against the objections of the defendants. The latter were improperly brought before the court, and they had a clear right to be discharged." (Our italics.)

The Circuit Court of Appeals says that plaintiffs' attorneys were authorized by the employment contract to institute all proceedings deemed advisable in furtherance of the collection of "all moneys due the debenture holders." (R. 362.) If this were the fact we would not be making the point. Plaintiffs' attorneys admit that their only authority to institute this suit is the uniform contract, about 1500 counterparts of which were secured by mail solicitation. This contract says as plainly as the English language can express an agreement that the attorneys are employed "to collect all moneys due upon the Insull Utility Investments, Inc. Debentures". Authority to collect the money due "upon the debentures" is quite a different thing from authority to collect "all moneys due the debenture holders" from any source. By the very language of the contract authority is limited to the collection of moneys due upon the debentures. *This suit which the attorneys filed is one upon an alleged statutory liability and not one upon the debentures.*

The attorneys in their answer to the rule admit that they received no instructions from the named plaintiffs other than is set forth in the uniform contract. (R. 475.) The first twenty-four named plaintiffs were never notified of the filing of this complaint on February 3, 1933. (R. 474.) There was mailed to the last named five, after the filing of the complaint, a letter dated February 4, 1933 which said among other things: "It was necessary to file this suit yesterday and we take this means of notifying you that you have been selected as one of the twenty-nine plaintiffs pursuant to the authority granted the attorneys in paragraph 2 of the uniform contract with debenture holders." (R. 475.) These letters did not give the title or number of the case, but assuming that plaintiffs learned of the commencement of this suit and that they did not protest the use of their names, under the specific language of the Illinois Supreme Court in *Frye* v. *Calhoun,* 14 Ill. 131, 133, ratification by silence is not a justification for bringing the suit without the advance authority or consent of the plaintiffs.

The Circuit Court of Appeals did not make the investigation of this point that the law requires, but contented itself with saying that "The District Court investigated this matter thoroughly and concluded that attorneys for plaintiffs had authority to prosecute these proceedings" and then concluded "We see no reason for disturbing this conclusion." We direct attention to the fact that Judge Wilkerson heard the testimony on this branch of the case but did not decide the question. However during the hearing he did comment that it would be "a rather far-fetched ruling" to hold that the contract authorized the filing of this suit. (R. 486.) When the case was decided by Judge Briggle he had disposed of the case in favor of the defendants on other grounds and it was not necessary for him to decide this question. We do not know how

much consideration he gave to this point, but his memoranda of decision would indicate that it was only casual. (R. 297.) Whatever consideration the District Court gave to the point, we respectfully submit that defendants are entitled to a full re-examination of the matter by this Court. *Pueblo of Santa Rosa* v. *Fall,* 273 U. S. 315, 319. If this suit was commenced without authority it must be dismissed.

We present this contention in all earnestness. We think a mere reading of the contract under which these attorneys claim to receive their authority to commence this suit is a conclusive answer to their claim. They admit they have no other authority than the contracts which were solicited in connection with the bankruptcy proceeding.

V.

The second motion for summary judgment should have been allowed. The settlement with and release of the four co-defendant directors, against whom exactly the same charges were made as are made against these remaining defendants, effected a discharge of all defendant directors for all causes of action alleged. The fact that the settlement agreement took the form of a covenant not to sue is immaterial. They paid $50,000 for the release, the suit was dismissed, and the Statute of Limitations barred commencing another.

When this suit was commenced by plaintiffs there were included among the defendants Walter S. Brewster, Waldo F. Tobey, Louis A. Ferguson, and Britton I. Budd, other former directors, the first of whom had been a member of both the Executive Committee and the Finance Committee. All of the acts of wrongdoing charged against the present defendants (cross-petitioners here) as directors were

charged against the settling defendants. In 1937, while the case was pending below, a settlement was made by the attorney for plaintiffs under which these defendants paid varying amounts, totaling $50,000, and the case was dismissed as to them. The remaining defendants, by their amended motion to dismiss (R. 215) and by their second motion for summary judgment (R. 284) claimed this resulted in a complete settlement of all causes of action and, therefore, released all former directors.

The instrument executed in effecting this settlement was in the form of a covenant not to sue, (R. 269-271,) and this plaintiffs contend saves their case against other alleged joint wrongdoers. R. 242-246.

We submit that no man of experience is credulous enough to believe that these four defendants paid to the attorney for plaintiffs $50,000 just for a contract that they would not be sued. There cannot be the slightest doubt that there was a complete settlement of the causes of action against these four defendants and that the attorney for plaintiffs convinced them that the payment of $50,000 would free them from any further liability. A suit brought at this late date would be barred by laches and the Statute of Limitations. It is obvious to anyone facing the realities that the four defendants who paid the $50,000 have been released from all liability on account of their acts as directors of I.U.I.

It is important here to again examine the power of attorney under which Lewis F. Jacobson pretended to act when he accepted the $50,000 from the settling directors and delivered to them agreements in the form of covenants not to sue, on behalf of the debenture-holders whom he claimed to represent, including the plaintiffs, and on behalf of the attorneys for these debenture-holders. This power of attorney authorized Jacobson "to execute and

acknoweldge any document or instrument whatsoever in furtherance of the collection of money due on said debentures, including the execution and vertification of a proof of claim in bankruptcy'' and also ''to collect, receive and account for all moneys due the undersigned on said debentures, including the execution and verification of a proof amount due on said debentures.'' (R. 467.) It will be observed that there is no authority given to Jacobson to receive moneys for covenants not to sue, nor is the authority given to him to execute such covenants on behalf of the debenture-holders whom he claims to represent. *The only authority given is to collect and account for all money due on the debentures, or to compromise the amount due and collect and account for a part.* Acting pursuant to that authority, Jacobson compromised with and collected $50,000 from four of the defendants and dismissed the case as to them.

This was a settlement of the cause of action against these four defendants regardless of the form of the settlement contract. The other defendants are not bound by the attempt to reserve the cause of action against them. Under the well-established law of Illinois and of most other American jurisdictions, when the cause of action is compromised, settled and released as to one or more of several joint wrongdoers, there is no cause of action left and no suit can be maintained against those with whom settlement is made or against any other persons alleged to have acted with them in the commission of the wrong. The fact that the instrument of settlement takes the form of a covenant not to sue is immaterial if all the circumstances show there was in fact a release. *City of Chicago* v. *Babcock*, 143 Ill. 358, 366; *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312; *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Vigeant* v. *Scully*, 35 Ill. App. 44, 47. It is the settled law of Illinois that when one of several alleged joint wrongdoers is released

all are released. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151.

CONCLUSION.

The Circuit Court of Appeals has wholly disregarded the Illinois decisions and decisions of this Court on the phase of the case presented by this cross-petition for writ of certiorari. It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers over the judgments and decrees of the Circuit Courts of Appeals in order that the errors committed by the Circuit Court of Appeals of the Seventh Circuit may be corrected. That these cross-petitioners may have the benefit of the rights to which they are entitled under the established law, this cross-petition should be granted and this Honorable Court should review the decision of the Circuit Court of Appeals and enter its judgment affirming the decree of the District Court in all respects.

Respectfully submitted,

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle St., Chicago,
Solicitors for Cross-Petitioners.

No. 824

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

SAMUEL INSULL, JR., et al.,
Cross-Petitioners,

vs.

DE MET'S INCORPORATED,
Cross-Respondent.

Cross-Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

CROSS-PETITION.

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

JOHN J. HEALY,
135 South LaSalle St., Chicago,
Solicitors for Cross-Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

No. .....

SAMUEL INSULL, JR., et al., Cross-Petitioners, vs. DE MET'S INCORPORATED, Cross-Respondent.	Cross-Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Cross-Petition for Writ of Certiorari.

To the Honorable the Supreme Court of the United States:

Samuel Insull, Jr., H. L. Stuart, Edward J. Doyle, F. K. Shrader and C. W. Sills respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Seventh Circuit directing that Court to certify to this Honorable Court the record in the case of *De Met's Incorporated, Plaintiff-Appellant,* v. *Samuel Insull, Jr., et al., Defendants-Appellees,* No. 7431 in that Court, in order that the decision and judgment of said Court rendered October 1, 1941, may be reviewed in so far as the Circuit Court of Appeals reversed the decree of the District Court for the Northern District of Illinois.

On this day De Met's Incorporated, and Robert E. Wood representing intervenors, filed a petition for a writ of certiorari to said Circuit Court of Appeals in this case, accompanied by a transcript of the record from said Court, seeking to have this Court review that portion of the

decision and judgment of said Court which affirmed the decree of the District Court. These cross-petitioners will oppose the petition of De Met's Incorporated and others on the ground that the Circuit Court of Appeals was right in so far as it affirmed the District Court.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. A., Sec. 347.) This cause originated in the United States District Court for the Northern District of Illinois and was reviewed on appeal by the United States Circuit Court of Appeals for the Seventh Circuit. The opinion of the Circuit Court of Appeals was filed August 22, 1941, but petitions for rehearing were filed and denied, and final judgment was entered October 1, 1941. R. 343, 405.

Statement of the Case.

This action was brought in January, 1933, to recover damages from the former directors of Corporation Securities Co. of Chicago, (hereinafter called "Corp.") after the bankruptcy of that corporation which occurred in April, 1932. The complaint was filed in equity and purported to be a class suit brought by the Delaware corporation as holder of certain serial gold notes of Corp., on behalf of itself and "all other owners and holders of such other notes similarly situated, and all other creditors who desire to join in this proceeding and share the costs and expenses thereof." (R. 2.)

One asserted ground of liability was the alleged violation of Section 23 of the 1919 General Corporation Act of Illinois by the "board of directors" in that it "authorized or ratified" the declaration of dividends by Corp. during the

years 1930, 1931 and 1932 when it had "no actual surplus." In so far as the complaint relates to this alleged cause of action, it alleges merely* that there was in force during the period involved said Section 23, which provides that "directors" shall be jointly and severally liable for "declaring or assenting to a dividend" if the corporation is or is thereby rendered insolvent or its capital is thereby impaired (Par. 32); that at no time between January 1, 1930, and April 16, 1932, did the company have any actual surplus and that the company did not have cash income for any year in excess of its cash expenses and interest charges for that year (Par. 22); that the company had no surplus at any time during the years 1930, 1931 and 1932, but the "company" paid cash dividends during each of these three years on all classes of its preferred stock, the exact amounts of which cash dividends are unknown to plaintiff (Par. 33); and that the "board of directors authorized or ratified" the payment of dividends, thereby rendering "themselves" jointly and severally liable within the purview of the statute to the plaintiff and all other creditors and holders of contracts with the company. Par. 34.

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* 22. At no time between January 1, 1930 and April 16, 1932, did the company have any actual surplus whatsoever. The books of the company, when the irregularities set forth above are corrected, show that the company did not have, and the company did not in fact have, cash income for any year in excess of its cash expenses and interest charges for that year.

32. During all of the period of the existence of Corporation Securities Co. of Chicago, there has been in full force and effect a certain statute of the State of Illinois known as Section 23 of the General Corporation Act, which is in words and figures as follows:

"The directors shall jointly and severally be liable for the debts and contracts of the corporation in the following cases:

(1) For assenting to an indebtedness in excess of the amount of the capital of the corporation, to the amount of

(*Footnote continued on pages 4 and 5*)

This case was presented to the District Court and is now before this Court as to the cause of action relating to alleged wrongful payment of dividends on motions to dismiss filed in 1933, which set forth that the complaint does not state a cause of action for payment of dividends contrary to the statute. (R. 17, 21, 24, 31.) Among the grounds set forth are:

> 1. A suit under Section 23 of the old General Corporation Act of Illinois must be brought on behalf of *all* creditors, whereas this suit is brought on behalf only of plaintiff and such other creditors as elect to join and share the costs and expenses;
>
> 2. Said Section 23 is unconstitutional because it is beyond the power of the legislature to declare a *conclusive* presumption of fact, as this section purports to do in the last paragraph, which provides: "Unless a director was absent from the meeting at which such dividend was declared, * * * or unless his dissent therefrom shall be entered on the corporate records he shall be conclusively presumed to have assented thereto";

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such excess; provided no director shall be liable under this clause (1) of this section if at the time such indebtedness is incurred, the value of the assets of the corporation as a going concern is greater than the amount of such indebtedness, including in such assets the assets acquired with or resulting from the incurring of such indebtedness; but not including in such assets good will or any sum therefor;

(2) For declaring or assenting to a dividend if the corporation is, or is thereby, rendered insolvent, or its capital is thereby impaired, to the extent of such dividend;

(3) For debts contracted between the time of making or assenting to a loan to a stockholder or director and the time of its repayment, to the extent of such loan.

For the purposes of this section the capital of the corporation shall be considered as the aggregate amount paid in on its shares of capital stock issued and outstanding.

3. The Illinois statute is penal in character and will not be enforced in Federal equity courts;

4. The complaint does not contain the essential allegation that the defendants or any of them, as directors of the corporation, *declared* or *assented to* the payment of any dividend;

5. The complaint does not allege facts which show that the corporation was insolvent at the time any dividend was declared or that the payment of any dividend rendered the corporation insolvent or that such payment impaired its capital.

The District Court dismissed the complaint as to this cause of action basing its decision only on the ground of insufficiency of allegations to state a cause of action. (Opinion, R. 298-299; Decree, R. 317.) The Circuit Court of Appeals reversed the judgment of the District Court as to this cause of action and held that the complaint was sufficient. R. 346.

A further ground of insufficiency of the complaint is that it fails to allege *facts* which show that the requisite jurisdictional amount is present. The only allegations as

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Unless a director was absent from the meeting at which such dividend was declared or loan made, or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto."

33. As hereinabove set forth, the company had no surplus at any time during the years 1930, 1931 and 1932. Nevertheless, the company paid cash dividends during each of these three years on all classes of its Preferred Stock, the exact amounts of which cash dividends are unknown to the plaintiff.

34. The Board of Directors authorized or ratified the payment of dividends as set forth above, thereby rendering themselves jointly and severally liable, within the purview of the Statute of the State of Illinois, set forth above, to the plaintiff, and all other creditors and holders of contracts of the company.

to amount involved appear in Paragraphs 4 and 10. Paragraph 4 merely makes the general statement that more than $3,000 is involved. (R. 3.) Paragraph 10 alleges merely that plaintiff owned notes of the face amount of $20,000 when it filed the complaint. (R. 6.) Paragraphs 33 and 34, which are the only paragraphs of the complaint relating to the payment of dividends, make no suggestion of the amount involved. (R. 12.) In fact, it is alleged in Paragraph 33, "the exact amounts of which cash dividends are unknown to the plaintiff."

The Circuit Court of Appeals ignored this point but sustained the complaint as to the cause of action relating to alleged wrongful payment of dividends, thereby holding in effect that the complaint alleged facts showing that the requisite jurisdictional amount is involved.

The Contested Issues.

As to the matters presented by this cross-petition the following questions arise:

(a) Whether the complaint alleges facts sufficient to show the requisite jurisdictional amount is involved.

(b) Whether the complaint alleges facts which state a cause of action against these cross-petitioners for declaring and assenting to the payment of dividends in violation of Section 23 of the old General Corporation Act of Illinois.

(c) Whether said Section 23 is constitutional.

(d) Whether this alleged cause of action for illegal payment of dividends can be maintained on behalf only of such creditors as join in the proceeding and share the expenses thereof.

(e) Whether the District Court properly denied the filing of the proffered amendments to the complaint.

(f) Whether plaintiff can maintain this suit in the absence of an allegation that it owned notes when the alleged wrongs were committed.

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of local law in conflict with applicable decisions of the Supreme Court of Illinois.

(a) When the Circuit Court of Appeals held "that a corporate director participates in a dividend, that is, declares or assents to a dividend, under the statute, if he votes to give such an executive committee the power to declare a dividend and this is done, if he himself is an active member of the executive committee which declares a dividend, or if he approves, ratifies or assents to a declaration of the executive committee," it assumed facts which do not appear on the face of the complaint and it announced rules of law in conflict with the decision of the Supreme Court of Illinois in *Lewis* v. *Montgomery*, 145 Ill. 30.

(b) When the Circuit Court of Appeals held, by adoption of its ruling in the companion case of *Aiken et al.* v. *Insull et al.*, that "the word 'assenting' includes the approval and declaration of a dividend after it has been declared," it held squarely against the Supreme Court of Illinois which has decided that "assenting," as used in the General Corporation Act of 1919, means assenting to the creation of the obligation, and that a recognition of the obligation after it has been contracted does not have the effect of charging a director with the statutory liability. *Lewis* v. *Montgomery*, 145 Ill. 30, 47.

(c) The Circuit Court of Appeals held contrary to the Illinois law when it held that the executive com-

mittee of Corp. was the agent of the board of directors in the declaration of dividends. *Lewis* v. *Montgomery,* 145 Ill. 30, 46.

(d) Since the original complaint did not state a cause of action with respect to improper payment of dividends, the new cause of action alleged in the proposed amendments, if a cause of action is alleged, is barred by the Statute of Limitations. *Allis-Chalmers Manufacturing Co.* v. *City of Chicago,* 297 Ill. 444; *Board of Education* v. *Blodgett,* 155 Ill. 441.

2. The Circuit Court of Appeals for the Seventh Circuit has decided an important question of Federal law in conflict with applicable decisions of this Court and with its own decisions and with decisions of other Circuit Courts of Appeals.

(a) The construction placed on Section 23 of the 1919 General Corporation Act of Illinois by the Circuit Court of Appeals in this case extends the statute by construction to embrace cases not within its terms, contrary to the rule applied by the same Circuit Court of Appeals in *White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.,* 268 Fed. 525, 527.

(b) The District Court ruled in accordance with the established practice in denying amendments offered seven years after the suit was commenced and nine years after the occurrences out of which the alleged cause of action arose. *National Bank* v. *Carpenter,* 101 U. S. 567, 568; *United States* v. *First Wisconsin Trust Co.,* 92 Fed. (2nd) 840, 844.

(c) The law is established that the requisite jurisdictional amount must affirmatively and distinctly appear from the allegations of the complaint and that a defect in such allegations cannot be helped by presumptions or by argumentative inferences drawn from the

pleadings. There is no allegation in the complaint at bar of the *amount* of any dividend paid nor are there facts alleged from which the amount may be determined. The decision in this case is contrary to the rule in *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Smith* v. *McCullough*, 270 U. S. 456, 459; *Norton* v. *Larney*, 266 U. S. 511, 515; *Hanford* v. *Davies*, 163 U. S. 273, 280.

(d) Since plaintiff has not by its allegations shown that the alleged wrongs occurred while plaintiff was the owner of notes it cannot maintain this suit. *Graham* v. *Railroad Co.*, 102 U. S. 148, 153; *Chicago Daily News Co.* v. *Siegel*, 212 Ill. 617, 629.

(e) The Circuit Court of Appeals was in error when it went outside the complaint and used the proposed amendments to bolster up the original complaint. It is established that on motion to dismiss all doubts with respect to the sufficiency of the complaint must be resolved against the plaintiff. *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Lyons* v. *Reinecke*, 10 Fed. (2nd) 3, 7; *United States* v. *Linn*, 42 U. S. 104, 111.

Respectfully submitted,

Conrad H. Poppenhusen,
Edward R. Johnston,
Floyd E. Thompson,
11 South La Salle Street, Chicago,

John J. Healy,
135 South La Salle Street, Chicago,
Solicitors for Samuel Insull, Jr., H. L. Stuart, Edward J. Doyle, F. K. Shrader and C. W. Sills, Cross Petitioners.

ARGUMENT IN SUPPORT OF CROSS-PETITION.

I.

The complaint did not state a cause of action against the defendants for alleged wrongful payment of dividends.

We present this point first because it is the ground on which the District Court dismissed the complaint as to the alleged cause of action against the former directors of Corporation Securities Co. of Chicago for declaring or assenting to the payment of a dividend in violation of section 23 of the General Corporation Act of Illinois of 1919, which was repealed by the Business Corporation Act of Illinois of 1933. We shall undertake to show that the holding of the District Court is in accord with the established law of Illinois as declared by the Supreme Court of Illinois and as applied by the Federal Courts of the Seventh Circuit.

There is no allegation in the complaint that any of these defendants (cross-petitioners here) *declared* or *assented to* any dividend at any time. The complaint merely alleges (Par. 33, R. 12) that "the company paid cash dividends" and (Par. 34, Rec. 12) that "the board of directors authorized or ratified the payment of dividends."

There is no allegation that either Samuel Insull, Jr., or H. L. Stuart or E. J. Doyle or F. K. Shrader or C. W. Sills attended any meeting of the board of directors at which action on dividends was taken. Not one of these defendants is mentioned by name except in the title and in the prayer of the complaint. There were *eleven* directors of this corporation (R. 2) and the six directors, *excluding the five who present this cross-petition*, could have taken the action necessary to cause the company to pay dividends.

It was this uncertainty of the allegations of this complaint that caused Judge Briggle to say, (R. 299):

> "The liability under the statute must be predicated upon the individual director having declared or assented to a dividend, and it is not enough to say that the company or the board or the committee declared a dividend. It would be a dangerous theory of law if an individual director were to be held liable for some misfeasance or malfeasance related to his conduct as a director without the assertion of some fact to show wrong on the part of the specific director involved."

This is sound reasoning supported by all authorities on pleading. It is well established that on a motion to dismiss all doubts with respect to the sufficiency of the complaint must be resolved against the plaintiff. *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Lyons* v. *Reinecke*, 10 Fed. (2nd) 3, 7; *United States* v. *Linn*, 42 U. S. 104, 111. We deem the failure of the plaintiff to allege that any of the *present defendants* ever *declared* or *assented to* the payment of a dividend by the corporation to be conclusive against the sufficiency of the complaint.

The allegations are wholly insufficient to state a cause of action under the Illinois statute in other respects. No facts are alleged to show what dividends were paid, or when they were paid, or that the corporation was insolvent when any dividend was paid, or that it was rendered insolvent by any such payment, or that its capital was thus impaired. The allegations of the complaint are mere conclusions of the pleader, unsupported by facts (Par. 22, R. 10; Par. 33, R. 12). It is a sound rule of pleading, especially on motions to dismiss, that ambiguities and uncertainties in pleadings are to be construed most strongly against the pleader. *United States* v. *Linn*, 42 U. S. 104, 111; *Coffey* v. *Colonial Trust Co.*, 50 Fed. (2nd) 313, 314.

We respectfully submit that the legal conclusions stated in the next to the last paragraph of the opinion of the Circuit Court of Appeals (R. 346) are squarely in conflict with the construction placed upon the General Corporation Act by the Supreme Court of Illinois in *Lewis* v. *Montgomery*, 145 Ill. 30. The Circuit Court of Appeals holds that an executive committee of a corporation is the agent of the board of directors, whereas the Illinois Supreme Court holds just the opposite in the cited case, saying at p. 46:

> "The directors though the governing body of the corporation are only its officers and agents and any subordinate agent appointed by them or acting by virtue of their sufferance or recognition does not thereby become their agent but the agent of the corporation. His acts are the acts of the corporation so as to make it liable for debts or obligations incurred by him on its behalf, but they are not the acts of the directors unless commanded or authorized by them."

The Circuit Court of Appeals holds that a director declares or assents to a dividend under the statute if he approves or ratifies a declaration of a dividend by an executive committee, whereas the Illinois Supreme Court holds directly to the contrary in the cited case, saying at p. 47:

> "The liability is created only where the indebtedness of the corporation exceeds the amount of the capital stock and is imposed only upon the directors and officers assenting to such excess of indebtedness. This plainly means assenting to its creation. Manifestly, a recognition of the indebtedness by the directors after it has been so contracted as to become binding upon the corporation, should not have the effect of charging them with this statutory liability."

The same Circuit Court of Appeals in *White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.*, 268 Fed. 525, recognized that the rules of construction declared by the Illinois Su-

preme Court in *Lewis* v. *Montgomery* to apply to section 16 of the Illinois statute dealing with directors' liability for assenting to indebtedness in excess of the capital stock, apply to section 19 of the statute providing for liability of directors for declaring or assenting to dividends in violation of the statute, saying p. 527:

> "Even if section 19 is held not to be a penal statute, it must at least be said that the liability imposed is like that of a surety, *stricti juris*. *Woolverton* v. *Taylor*, 132 Ill. 197. The liability imposed under section 19 is much more extreme and severe than that imposed under section 16. In *Lewis* v. *Montgomery*, 145 Ill. 30, 47, in construing section 16, it was said:
>
> 'The words employed * * * should not be extended by construction, so as to embrace cases not clearly within the terms of the statute.' "

But an equally serious objection to the conclusion reached by the Circuit Court of Appeals is that *facts are assumed* which do not appear from the allegations in the complaint. Nowhere in the complaint is it stated that there was an executive committee of Corp. or that the board of directors empowered an executive committee to declare dividends or that any of the present defendants were on an executive committee or that any of these defendants were present at a board meeting which empowered an executive committee to declare dividends. Thus is appears that the Circuit Court of Appeals goes beyond the four corners of the complaint for facts when it says in its opinion (R. 346): "In the instant case the board of directors empowered an executive committee to declare dividends."

It also appears that the Circuit Court of Appeals is assuming facts *not alleged* when it states (R. 346):

> "We believe that a corporate director participates in a dividend, that is, declares or assents to a dividend,

> under the statute if he votes to give such an executive committee the power to declare a dividend, and this is done if he himself is an active member of the executive committee which declares a dividend, or if he approves, ratifies or assents to a declaration of the executive committee."

We think the opinion of the Circuit Court of Appeals clearly reveals that the Court confused the allegations of the complaint in this case filed in 1933, which is the pleading being tested by the motions to dismiss filed shortly thereafter, with the allegations of amendments to the complaint which were presented in 1940, more than eight years after the dates of the challenged transactions.

Another ground of insufficiency of the complaint is that the suit is not brought by plaintiff on behalf of *all* creditors. That the liability under section 23 is personal to the creditors and that a suit to enforce the liability must be brought by one or more creditors on behalf of all creditors is established by *Ryerson & Son* v. *Peden,* 303 Ill. 171, 184; *Seegmiller* v. *Day,* 249 Fed. 177, 179; and *Pollard* v. *Bailey,* 20 Wall. 520, 527. This suit is brought by plaintiff on its own behalf as a holder of corporate notes and on behalf of other holders of such notes similarly situated and all other creditors who desired to join in the suit and share the costs and expenses thereof (R. 2). Certain noteholders represented by General Robert E. Wood intervened, but there are many that did not elect to join in the proceeding and make themselves liable for costs and expenses of this suit. When this suit was filed the banks and others besides noteholders had claims aggregating some $25,000,000. We think it is clear from the allegations of the complaint that it was never intended by plaintiff to include the banks as its co-plaintiffs. Since this suit was not brought on behalf of all creditors it cannot be maintained as a suit under the Illinois statute.

Another defect in the complaint that is fatal to the maintenance of this suit by plaintiff or intervenors (cross-respondents here) is that it is nowhere alleged that they were creditors of the corporation *at the time* the dividends were declared and paid. *Graham* v. *Railroad Co.*, 102 U. S. 148, 153; *Chicago Daily News Co.* v. *Siegel*, 212 Ill. 617, 629; *Buell* v. *Lanski*, 232 Ill. App. 500, 511. Whether plaintiff extended credit to the corporation or whether it bought its notes in the open market for a nominal sum after the corporation was in bankruptcy does not appear from the allegations of the complaint. Plaintiff says it owned notes of the face amount of $20,000 when it filed the complaint (Par. 10, R. 6), but it does not allege when it acquired these notes, except that it acquired them before maturity which may have been any time before the suit was commenced; nor what it paid for them except that it was something of value; nor that it owned them when the challenged transactions took place. If it bought its notes after the alleged wrongful dividends were paid and got them at a price which took into account the depleted assets of the corporation, it cannot now sue for wrongs which caused it no injury. Courts do not countenance speculation by litigation.

If this action for improper payment of dividends were brought on behalf of all creditors of the corporation and the complaint otherwise alleged a case within the terms of the statute and this plaintiff was in position to maintain the suit, it could not be maintained because the statute on which it is based is unconstitutional. The last paragraph of the statute provides, "Unless a director was absent from the meeting at which such dividend was declared, * * * or unless his dissent therefrom shall be entered on the corporate records, he shall be conclusively presumed to have assented thereto." It is beyond the power of the legislature to declare a *conclusive* presumption. Such an

attempt is an invasion of the judicial field and violates Section 2 of Article II and Article III of the State Constitution and the Fourteenth Amendment to the Federal Constitution. (*Carolene Products Co.* v. *McLaughlin*, 365 Ill. 62, 70; *People* v. *Rose*, 207 Ill. 352, 361; *Hall* v. *Woods*, 325 Ill. 114, 144; *Heiner* v. *Donnan*, 285 U. S. 312, 329. This provision of Section 23 creating a conclusive presumption being unconstitutional, it follows that subdivision 2 of this section, of which this invalid provision is an essential and integral part, is likewise invalid. (*Chicago Motor Club* v. *Kinney*, 329 Ill. 120, 134; *Springfield Gas Co.* v. *Springfield*, 292 Ill. 236, 243.) The Supreme Court of Illinois decided, under the Illinois Corporation Act prior to the revision thereof in 1919, that a director could only be held liable for the violation of the statute when the evidence showed that he had consciously approved or participated in the wrongful act. (*Lewis* v. *Montgomery*, 145 Ill. 30,) and the Federal courts in Illinois gave this statute the same construction. (*White-Wilson-Drew Co.* v. *Lyon-Ratcliff Co.*, 268 Fed. 525; *Chick* v. *Fuller*, 114 Fed. 22, 29.) The very purpose of the addition of the conclusive presumption clause in 1919 was to change this rule of evidence.

The provision of Section 23 under consideration is a penal statute. It in effect *prohibits* declaration of a dividend which will render the corporation insolvent or which will impair the capital of the corporation. It *punishes* directors for violation of their duties to the corporation and its stockholders and creditors. (*Vestal* v. *Robertson*, 277 Ill. 425, 430; *Patterson* v. *Thompson*, 86 Fed. 85, 86.) Inasmuch as liability sought to be created by the section is penal in character, a suit cannot be maintained in equity to enforce such liability. (*Loverin* v. *McLaughlin*, 161 Ill. 417, 435; *Robson* v. *Doyle*, 191 Ill. 566, 570.) The Federal courts will not enforce a penal law of Illinois. *Gwin* v. *Breedlove*, 43 U. S. 29, 37; *Sherman* v. *Gassett*, 4 Gil. 521.

For all these reasons the District Court properly dismissed the cause of action for wrongful payment of dividends. While it based its decision only on the ground of insufficiency of the complaint to state a cause of action, the decree will be sustained if any ground appearing of record is sound. The Circuit Court of Appeals erred in holding the original complaint sufficient and in reversing the decree of the District Court.

We respectfully submit that under the authorities the District Court properly refused the amendment to the complaint not only because it was presented too late, (*National Bank* v. *Carpenter*, 101 U. S. 567, 568, *L. E. Whitham Construction Co.* v. *Remer*, 105 Fed. (2nd) 371) but also because it failed to state a cause of action. (*Lewis* v. *Montgomery*, 145 Ill. 30, 47.) The allowance of an application to amend rests in the discretion of the trial court and its order denying the application will not be reversed unless there is an abuse. *United States* v. *First Wisconsin Trust Co.*, 92 Fed. (2nd) 840, 844; *Davis* v. *Virginia Ry. & Power Co.*, 229 Fed. 633, 639.

These defendants filed their motions to dismiss in 1933 (R. 17-38) and these motions were continued generally on the motion of plaintiff on January 19, 1934. (Aiken R. 58.) The case lay dormant for more than six years. In 1939 defendants took steps which stirred plaintiffs to action. The proposed amendments were offered March 1, 1940, (R. 300) more than seven years after the complaint was filed. The District Court ruled in accordance with established practice regarding tardy amendments. The Circuit Court of Appeals ruled directly contrary to the spirit of the established law as well as the new Federal Rules of Civil Procedure which stress dispatch of business of the courts and require diligence on the part of litigants.

Since the original complaint did not state a cause of action, the new cause of action alleged in the amendments,

if a cause of action is alleged, is barred by the Statute of Limitations. (*N. & G. Taylor Co.* v. *Anderson,* 275 U. S. 431, 438; *Allis-Chalmers Co.* v. *City of Chicago,* 297 Ill. 444, 449. Under Illinois law this completed bar is a vested right which is protected by the Constitution. *Board of Education* v. *Blodgett,* 155 Ill. 441; *Hanley* v. *Waters,* 255 Ill. App. 239.

Even the proposed amendment did not state a cause of action. *No director is charged with declaring or assenting to any dividend.* It is merely charged that "the executive committee" *declared* certain dividends (Par. 7, R. 305) and that these "defendants" thereafter *ratified* the action of this executive committee. (Par. 1, R. 301-303). The executive committee was composed of four of the directors (Par. 6, R. 305). Of these Samuel Insull and M. J. Insull were never served. Only Samuel Insull Jr. and H. L. Stuart of those now before the court were on the executive committee. Their acts as members of this committee were not acts *as directors.* As committeemen, they were agents of the corporation and not of the board of directors. *Lewis* v. *Montgomery,* 145 Ill. 30, 47. Neither defendant Doyle nor Shrader nor Sills were on the executive committee. An examination of the proposed amendment will show that on no occasion is it alleged that either Doyle or Shrader or Sills *declared* or *assented to* a dividend in any capacity. It is alleged merely that they *ratified* what the executive committee had already done,—Doyle on six occasions (par. 1 (f), (h), (j), (l), (n), (p)); Shrader on two (Par. 1 (b), (f)) and Sills on three Par. 1 (b), (f), (l)) (R. 301-303). The amendment shows that the five defendants (cross-petitioners here) *as directors* of the corporation merely *ratified* what the executive committee had already done and so serves to show that there is no cause of action under the Illinois statute against these defendants, or any of them,

for wrongfully *declaring* or *assenting to* a dividend, which is what the statute makes actionable. *Lewis* v. *Montgomery*, 145 Ill. 30, 47.

II.

The complaint fails to allege facts which show that the requisite jurisdictional amount is involved.

The only paragraphs of the complaint which state any amount are paragraphs 4 and 10. Paragraph 4 consists merely of the general statement that more than $3,000 is involved (R. 3). Paragraph 10 alleges merely that plaintiff owned notes of the face amount of $20,000 when it filed the complaint (R. 6) but it does not allege what plaintiff paid for these notes except that it was something of value, nor that plaintiff has been damaged to an amount in excess of $3,000 or in any other amount. *There is no allegation anywhere in the complaint from which it is possible to determine the amount of any dividend that was declared or paid.* In fact it is alleged in paragraph 33, "the exact amounts of which cash dividends are unknown to the plaintiff" (R. 12). An examination of paragraphs 33 and 34, which are the only paragraphs of the complaint relating to the payment of dividends, will not reveal even a suggestion of the amount involved much less that the amount exceeds $3,000.

It is not enough that a complaint contain a formal allegation of jurisdictional amount. It must allege facts showing that the amount in controversy exceeds $3,000. *Smith* v. *McCullough*, 270 U. S. 456, 459; *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Woods* v. *Thompson*, 14 Fed. (2nd) 951, 952. It must affirmatively and distinctly appear from the facts alleged and not by inference or argument that the necessary amount is involved. *Norton*

v. *Larney*, 266 U. S. 511, 515; *Hanford* v. *Davies*, 163 U. S. 273, 280; *Wolfe* v. *Hartford Life & Annuity Ins. Co.*, 148 U. S. 389. If the requisite jurisdictional amount does not appear from the allegations of the complaint the case must be dismissed. *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, 86; *Pianta* v. *Reich Co.*, 77 Fed. (2nd) 888, 890.

The Circuit Court of Appeals does not discuss this point in its opinion in this case but disposes of the point by mere general reference to its opinion in *Aiken* v. *Insull* (R. 344). Since that Court refers to the proposed amendments in the *Aiken* case to bolster up the original complaint (R. 357) it must have referred to the proposed amendments in this case to get even a suggestion of the amount involved. It is well established that on a motion to dismiss all doubts with respect to the sufficiency of the complaint must be resolved against the plaintiff. *Mutual Life Ins. Co.* v. *Thompson*, 27 Fed. (2nd) 753, 754; *Lyons* v. *Reinecke*, 10 Fed. (2nd) 3, 7; *United States* v. *Linn*, 42 U. S. 104, 111. It is essential that the complaint itself sets forth sufficient facts to show the necessary jurisdictional amount and the Circuit Court of Appeals was in error when it went outside of the complaint to find the essential allegations of fact.

Plaintiff alleges that it owned notes when it filed the complaint in 1933 (Par. 10, R. 6) but it does not allege *when* it acquired these notes, except that it acquired them before maturity which may have been any time before the suit was commenced. There is no allegation that plaintiff owned these notes when the challenged declaration of dividends took place. There being no allegation that any wrong was committed *by any defendant* at any time *when plaintiff owned notes*, there is no allegation of any injury *in any amount* to the named plaintiff or to any intervenor or to any present creditor.

On this ground of failure to allege facts to show jurisdiction in a Federal court the complaint was properly dismissed.

CONCLUSION.

The Circuit Court of Appeals has wholly disregarded the Illinois decisions and decisions of this Court on the phase of the case presented by this cross-petition for writ of certiorari. It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers over the judgments and decrees of the Circuit Court of Appeals in order that the errors committed by the Circuit Court of Appeals may be corrected. That these cross-petitioners may have the benefit of the rights to which they are entitled under established law, this cross-petition should be granted and this Honorable Court should review the decision of the Circuit Court of Appeals and enter its judgment affirming the decree of the District Court in all respects.

Respectfully submitted,

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

JOHN J. HEALY,
135 South LaSalle St., Chicago,
Solicitors for Cross-Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

THOMAS D. AIKEN, ET AL.,
Plaintiffs-Petitioners,

VS.

SAMUEL INSULL, JR., ET AL.,
Defendants-Respondents.

Answer to Petition for Writ of Certiorari.

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle St., Chicago,
Solicitors for Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

No. 821

THOMAS D. AIKEN, ET AL.,
Plaintiffs-Petitioners,

VS.

SAMUEL INSULL, JR., ET AL.,
Defendants-Respondents.

Answer to Petition for Writ of Certiorari.

To the Honorable The Supreme Court of the United States:

The petitioners have not made an accurate statement of the case.

The statement that Insull Utility Investments, Inc. was organized by present defendants (respondents here) (Pet. 3) is not supported by the record. The allegation of the complaint (Par. 5, R. 3-5) is that the company was organized by Samuel Insull, now deceased, in the fall of 1928. Thereafter, in 1929, present defendants were elected directors of the company. Par. 8, R. 5.

The record does not support the statement that the public utility companies of the Insull Group, in the shares

of which I.U.I. made substantial investments, were "under the direction and management of the defendants". (Pet. 3.) There is no allegation anywhere in the complaint that respondents, H. L. Stuart or Stuyvesant Peabody, had anything to do with the operation of any of these public utility companies at any time.

In stating the covenant of the debentures, (Pet. 3) petitioners omit the exceptions to the restrictions on pledging which are that "the Company without so securing this debenture (a) may at any time mortgage or pledge any of its property for the purpose of securing loans to the Company contracted in the usual course of business for periods not exceeding one year, and (b) may in order to secure the purchase price or part thereof of any property which it may hereafter acquire, mortgage or pledge any or all of such acquired property." R. 8-9, 14.

It is not true that "shortly after I.U.I. was organized, the defendant directors caused I.U.I. to pledge substantially all its assets to secure loans." (Pet. 4.) I.U.I. was an investment company organized "to acquire, dispose of, underwrite and deal in securities, and do a general investment business", (R. 3,) and borrowing money to make investments was in the usual course of its business. The facts alleged in Paragraph 30 (R. 24-32) show that the first loan was made April 14, 1930, when $2,500,000 was borrowed from the Continental Bank, and that the last loan was made December 22, 1931, when a loan of $500,000 was made by the General Electric Company. All the loans were for short periods and there were many renewals. It is alleged in Paragraph 34 (R. 32) that as late as May 15, 1931, the value of the assets of I.U.I. was approximately $193,000,000 and its outstanding obligations were approximately $98,000,000. It is clear from the allegations of the complaint that when the original loans were made they were small when compared with

the assets of the company and that the drastic decline in market value of securities brought about by the cataclysmic world-wide economic depression and not the original borrowing and pledging caused the bankruptcy of I.U.I.

After I.U.I. went into bankruptcy a score of suits were filed against the banks by the trustee in bankruptcy and by different groups of debenture-holders. (R. 116-128.) By their suits the debenture-holders sought decrees against the banks to compel surrender of all notes of I.U.I. and of all collateral pledged and for an accounting. (R. 112.) After negotiation it was agreed that all claims of the debenture-holders and the trustee in bankruptcy be compromised and settled. (R. 137.) A decree was entered in chancery confirming in the banks title to the collateral pledged with them, free from all claims asserted or assertable by the debenture-holders or the trustee arising out of or in any manner connected with the pledging, (R. 175,) and permanently enjoining the debenture-holders from instituting or prosecuting any suits against the banks on account of such pledgings. (R. 177.) An order was entered in bankruptcy reciting that the settlement had been fully carried out by the payment by the banks of $3,435,088.07 and the performance of other terms of the settlement "in full settlement and compromise of all claims involved" in all of the pending suits, (R. 196,) and ordering that the acts of the trustee in bankruptcy in carrying out the settlement be approved and that he deliver releases to all of the banks. R. 197.

It is not true that the banks agreed that the cause of action against the former directors of I.U.I. should not be affected by the settlement. (Pet. 5.) The debenture-holders as petitioners made the assertion in their petition for approval of the settlement that the release of the banks should not release former directors of the company (R.

143) but this attempted reservation of a cause of action against the former directors was not made a condition of the effectiveness of the release of the banks.

Reasons for Denial of the Writ.

1. The decision of the Circuit Court of Appeals with respect to the release of the alleged cause of action against the former directors of I.U.I. arising out of the alleged pledging of assets by I.U.I. in violation of debenture covenants, by virtue of the release of the banks for their participation in said pledging, follows the decisions of the courts of Illinois. Under the settled law of Illinois the release of the settling banks released the former directors of I.U.I. as to all causes of action asserted or which might have been asserted by the debenture-holders for or on account of the alleged wrongful pledging of the assets of I.U.I. as collateral to the bank loans. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Guth* v. *Vaughan*, 231 Ill. App. 143; *Killham* v. *Chaloupka*, 195 Ill. App. 182, 185; *Gore* v. *Henrotin*, 165 Ill. App. 222, 224; *Vigeant* v. *Scully*, 35 Ill. App. 44, 46; *Chapin* v. *C. & E. I. Ry. Co.*, 18 Ill. App. 47, 50.

This rule that where two or more persons each contribute to cause a single injury the release of one releases all is not only the settled law of Illinois but it is the law of most if not all American jurisdictions. *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383; *Smith* v. *Mann*, 184 Minn. 485, 239 N. W. 223, 224; *Muse* v. *DeVito*, 243 Mass. 384, 137 N. E. 730, 731; *Lanasa* v. *Beggs*, 159 Md. 311, 151 Atl. 21, 25; *Abb* v. *Northern Pacific Ry. Co.*, 28 Wash. 428, 68 Pac. 954, 955; *Chetwood* v. *California National Bank*, 113 Cal. 414, 45 Pac. 704, 706; *Sircey* v. *Hans Rees Sons*, 155 N. C. 296, 71 S. E. 310, 311; *McBride* v. *Scott*, 132 Mich. 176, 93 N. W. 243, 244; *Gholson* v. *Savin*, (Ohio.) 31 N. E. (2nd) 858, 863; *Bronson* v. *Fitzhugh*, 1

Hill (N. Y.) 185; *Kaplowitz* v. *Kay,* 70 Fed. (2nd) 782, 783; *Spiess* v. *Sommarstrom Ship Bldg. Co.,* 272 Fed. 109, 111.

Furthermore the settling debenture-holders released the cause of action against the former directors of I.U.I. by an election of substantive rights in making their settlement with the banks. *Birdsell Manufacturing Co.* v. *Oglevee,* 187 Ill. 149, 153; *Gibbs* v. *Redman Fireproof Storage Co.,* 68 Utah 298, 249 Pac. 1032; *MacDonald* v. *Hornblower & Weeks,* 268 Mich. 626, 256 N. W. 572; *DeCock* v. *O'Connell,* 188 Minn. 228, 246 N. W. 885, 887; *Fowler* v. *Bowery Savings Bank,* 113 N. Y. 450, 21 N. E. 172.

Parmelee v. *Lawrence,* 44 Ill. 405, and other cases relied on by petitioners are clearly distinguishable because they apply only to joint obligor cases where there is the right of contribution.

2. The rule of release established by the Illinois decisions and applied by the Circuit Court of Appeals in this case is founded on sound public policy and is a salutary rule of law. *Chapin* v. *C. & E. I. Ry. Co.,* 18 Ill. App. 47, 50, citing *Brown* v. *City of Cambridge,* 85 Mass. 474, 475; *Farmers' Savings Bank* v. *Aldrich,* 153 Ia. 144, 133 N. W. 383, 386; *Rust* v. *Schlaitzer,* 175 Wash. 331, 27 Pac. (2nd) 571, 573; *Sircey* v. *Hans Rees Sons,* 155 N. C. 296, 71 S. E. 310, 311; *McBride* v. *Scott,* 132 Mich. 176, 93 N. W. 243, 245.

3. The former directors of I.U.I. did not stand in the relation of trustees to the debenture-holders. *People* v. *Superior Court,* 359 Ill. 612, 619; *Becker* v. *Billings,* 304 Ill. 190, 198; *Gottlieb* v. *Miller,* 154 Ill. 44, 50; *Briggs* v. *Spaulding,* 141 U. S. 132, 147; *Van Weel* v. *Winston,* 115 U. S. 228, 245; *Webb* v. *Cash,* 35 Wyo. 398, 250 Pac. 1, 8; *Hart* v. *Evanson,* 14 N. D. 570, 105 N. W. 942, 943.

But if I.U.I. stood in the relation of a trustee to the debenture-holders and if it violated its duty by pledging its assets, then all who acted with I.U.I. in breaching its trust are liable jointly and severally for the wrong, and so the release of one would release all. *First & Merchants National Bank* v. *Bank of Waverly*, 170 Va. 496, 197 S. E. 462, 465; *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 385; *Braswell* v. *Morrow*, 195 N. C. 127, 141 S. E. 489, 491; *Whitford* v. *Reddeman*, 196 Wis. 10, 219 N. W. 361; *DeCock* v. *O'Connell*, 188 Minn. 228, 246 N. W. 885, 887; *Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah 298, 249 Pac. 1032, 1034.

4. The decisions in *Kelly* v. *Central Hanover Bank & Trust Co.*, 11 Fed. Supp. 497, and in 85 Fed. (2nd) 61, are based on a failure of proof after a trial and can have no application to the case at bar which presents entirely different issues on different pleadings. We have here the effect of a comprehensive and unconditional release of some of several alleged joint wrongdoers. The legal effect of the release of the settling banks cannot be explained away nor can the debenture-holders, after accepting the benefits of the settlement, make the excuse that the banks were not in fact wrongdoers. *Chapin* v. *C. & E. I. Ry. Co.*, 18 Ill. App. 47, 51; *Guth* v. *Vaughan*, 231 Ill. App. 143; *C. C. C. & St. L. Ry. Co.* v. *Hilligoss*, 171 Ind. 417, 86 N. E. 485, 488; *Martin* v. *Setter*, 184 Minn. 457, 239 N. W. 219, 222; *Kirkland* v. *Ensign-Bickford Co.*, 267 Fed. 472, 475.

5. The Circuit Court of Appeals does not hold that the banks and the former directors of I.U.I. were jointly liable as tort feasors and it is the settled law of Illinois that the application of the rule of release of all by the release of some of several alleged joint wrongdoers is not confined to cases where the alleged wrongdoers are jointly liable. The rule applies where all contributed to the same injury even though they acted severally. *Chapin* v. *C. &*

E. I. Ry. Co., 18 Ill. App. 47, 50; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Wagner* v. *C. & A. R. Co.*, 265 Ill. 245, 251; *Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah 298, 249 Pac. 1032, 1034; *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 385; *DeCock* v. *O'Connell*, 188 Minn. 228, 246 N. W. 885, 887; *Muse* v. *DeVito*, 243 Mass. 384, 137 N. E. 730, 731.

6. The separate point with respect to the release of the New York banks is an afterthought. It was not presented to the District Court for decision and there is no assignment of error on the record which presented the point to the Circuit Court of Appeals. Furthermore, the assumed facts from which the argument is made are not supported by the record.

7. The statement that the decree approving the settlement with the banks was entered on the express condition that the cause of action against the former directors of I.U.I. would be preserved is directly contrary to the facts. It is immaterial that the settling debenture-holders who petitioned for the decree intended to release only the banks. There is no dispute among the authorities that where there is an absolute and unconditional release of one of several alleged wrongdoers it operates to release all who participated in the same act. *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312; *Bee* v. *Cooper*, 217 Cal. 96, 17 Pac. (2nd) 740, 741; *McBride* v. *Scott*, 132 Mich. 176, 93 N. W. 243, 244; *Rust* v. *Schlaitzer*, 175 Wash. 331, 27 Pac. (2nd) 571; *Thompson* v. *Fox*, 326 Pa. 209, 192 Atl. 107, 109; *Ducey* v. *Patterson*, 37 Colo. 216, 86 Pac. 109; *Gholson* v. *Savin*, (Ohio,) 31 N. E. (2nd) 858, 863.

In addition to the grounds assigned by the District Court and the Circuit Court of Appeals in sustaining the motion for summary judgment there are other equally well-sup-

ported grounds why a decree for defendants must be entered with respect to the alleged cause of action grounded on the pledging of assets of I.U.I. as security for bank loans.

8. The complaint fails to allege facts which show that the requisite jurisdictional amount is involved. This is not a true class action, (*Ayer* v. *Kemper*, 48 Fed. (2nd) 11, 14,) and the amounts of the separate claims of the plaintiff debenture-holders cannot be combined to create the necessary jurisdictional amount. (*Pinel* v. *Pinel*, 240 U.S. 594, 596; *Clay* v. *Field*, 138 U.S. 464, 479.) The complaint must affirmatively and positively allege facts which show that the jurisdictional amount is present and the allegations cannot be helped by presumptions or argumentative inferences. (*Norton* v. *Larney*, 266 U.S. 511, 515; *Hanford* v. *Davies*, 163 U.S. 273, 280.) There is no allegation in the complaint that any plaintiff was a creditor at the time of the alleged wrongful borrowings and pledgings, and so there is no allegation of any injury in any amount to any plaintiff. (*Graham* v. *Railroad Co.*, 102 U.S. 148, 153; *Chicago News Co.* v. *Siegel*, 212 Ill. 617, 629.) A spurious class suit must be dismissed as to each plaintiff who does not individually and severally allege affirmatively and distinctly that he has a claim in excess of $3,000. *Ogden* v. *Armstrong*, 168 U.S. 224, 232; *Russell* v. *Stansell*, 105 U.S. 303, 304.

9. The plaintiffs were collusively selected to create an appearance of diversity of citizenship which does not in fact exist. No debenture-holder who resided outside Illinois was consulted respecting the institution of this suit or the selection of the plaintiffs in whose names the suit was instituted. This ground of lack of jurisdiction supports the decree dismissing the suit. *Southern Realty Investment Co.* v. *Walker*, 211 U.S. 603; *Detroit* v. *Dean*, 106

U.S. 537, 541; *Quincy* v. *Steel*, 120 U.S. 241, 248; *Cerri* v. *Akron-People's Telephone Co.*, 219 Fed. 285.

10. The authority of plaintiffs' attorneys to institute and prosecute this suit was appropriately challenged and they failed to sustain the burden of showing that they had authority to commence this suit against the former directors of I.U.I. Their only authority was to sue to collect moneys due upon the debentures. No named plaintiff knew that the suit against these defendants had been commenced until after the complaint had been filed. A suit commenced without authority cannot be prosecuted even where plaintiffs acquiesce or attempt to ratify the commencement of the suit. *Frye* v. *County of Calhoun*, 14 Ill. 131, 132; *Town of Kankakee* v. *Kankakee & Indiana R. Co.*, 115 Ill. 88, 92; *Bell* v. *Farwell*, 189 Ill. 414, 417; *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315, 319; *Sutherland* v. *International Insurance Co.*, 43 Fed. (2nd) 969, 972.

11. The facts alleged in the complaint do not state a cause of action against the former directors of I.U.I. or any of them on account of the alleged violation of the debenture covenants in pledging assets as security for bank loans. The complaint states mere conclusions as to those matters which are essential to state a cause of action for wrongful pledging. (*Van Weel* v. *Winston*, 115 U.S. 228, 237; *Sterling Gas Co.* v. *Higby*, 134 Ill. 557, 568; *Bosworth* v. *Van Lanningham*, 293 Fed. 875, 877.) There is no allegation that any of the indebtedness for which a pledge was made was created after the debentures were issued. Renewals of notes are merely extensions of time of payment and not the creation of new indebtedness. *Kelly* v. *Central Hanover Bank & Trust Co.*, 11 Fed. Supp. 497, 504; *Griffin* v. *Long*, 96 Ark. 268, 131 S.W. 672, 673; *Phoenix Bank* v. *Martin*, 219 Ky. 579, 293 S.W. 1064, 1067; *Poughkeepsie* v. *Quintard*, 136 N.Y. 275, 32 N.E. 764.

12. Plaintiffs became creditors of I.U.I. by purchasing its debentures. In each debenture was a provision that all liability of the directors for the payment of the debenture was waived and released by the holders of the debentures. This no recourse provision precludes any recovery by plaintiffs against defendants as former directors for the payment of the debentures or any part thereof. *Continental Corp.* v. *Gowdy*, 283 Mass. 204, 186 N.E. 244, 246; *Marfield* v. *Cincinnati D. & T. Traction Co.*, 111 Ohio 139, 144 N.E. 689, 691; *Babbitt* v. *Read*, 215 Fed. 395, 417, affirmed in 236 Fed. 42.

13. In addition to the settlement with the banks, plaintiff debenture-holders settled with four co-defendant directors and dismissed the suit as to them after the Statute of Limitations barred the commencement of a new suit. This settlement with and release of some former directors, who were charged with identically the same wrongs as are charged against present defendants, effected a discharge of all former directors for all causes of action alleged. The fact that this settlement agreement took the form of a covenant not to sue is immaterial. *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312; *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Bee* v. *Cooper*, 217 Cal. 96, 17 Pac. (2nd) 740; *Lanasa* v. *Beggs*, 159 Md. 311, 151 Atl. 21, 25; *Rust* v. *Schlaitzer*, 175 Wash. 331, 27 Pac. (2nd) 571, 573.

14. These respondents may sustain the decree of the District Court upon any ground warranted by the record, though they may wish to show that the District Court might have based its decree on different and additional grounds and that the Circuit Court of Appeals might have affirmed on different and additional grounds. (*McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434; *Langnes* v. *Green*, 282 U.S. 531; *Mattingly* v. *Northwestern Virginia R. Co.*, 158 U.S. 53, 57; *Hülmer* v. *Chicago Bank of Commerce*, 375 Ill. 266, 272.) It is the con-

sidered opinion of counsel for respondents that the grounds assigned by the District Court as the basis for its decree and the grounds assigned by the Circuit Court of Appeals as the basis for its judgment in so far as it affirmed the decree of the District Court are sound, and that the petition should be denied for the reasons assigned in Points 1 to 7, *supra*. In addition to the sound reasons assigned for the decision in favor of respondents, there are other reasons equally sound which require that the petition be denied, which reasons are set forth in Points 8 to 13, *supra*.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The conclusion reached by the District Court and the Circuit Court of Appeals that the release and discharge of the banks operated to release and discharge the former directors of I.U.I. from all liability for the alleged wrongful pledging is fully supported by the established law and sound logic.

A.

The argument of plaintiffs' counsel is based on the erroneous assumption of fact that the release of the banks was conditioned upon the reservation of the cause of action against the former directors of I.U.I.

An examination of the proceedings of the United States District Court and the settlement papers which appear as exhibits to the motion for summary judgment will disclose that the assumption of fact made by plaintiffs' counsel that the release of the banks was conditioned on the reservation of some cause of action against the former directors of I.U.I. is without foundation and that the whole argument resting on this false premise falls of its own weight.

After describing the score of suits pending in the Federal courts of New York and Illinois against the New York and Chicago banks by the debenture-holders and the trustee in bankruptcy of I.U.I. (Pars. 1-6, R. 116-122; Pars. 8-10, R. 125-126), and the extensive negotiations between the attorneys for the creditors and the trustee and

the attorneys for the banks (Par. 25, R. 136), the petition states that the debenture holders had agreed to compromise and settle their claims which had been asserted or which were assertable against the banks in the various pending equity suits as well as the claims of the trustee in bankruptcy in the several pending preference suits. (Par. 26.) There is no suggestion here that the settlement was other than absolute and unconditional. (R. 137.) The whole argument of plaintiffs' counsel rests upon their construction of Sub-Paragraph K of Paragraph 26. There is not a suggestion in this paragraph or in anything that precedes it that the attempted limitation of the effect of the release of the banks should be a condition of the settlement with the banks. The paragraph is just an announcement of the hope of the petitioners that the release of the banks would not be construed as a release of former officers or directors of I.U.I. (R. 143.) There is nothing in the record to show that the banks agreed to this attempted reservation as a limitation of the effect of the release to be given to them upon the consummation of the settlement arrangement. The banks were not parties to the petition. There was no answer to the petition by the New York banks, and the Chicago banks by their answer merely admitted that the allegations of the petition that a settlement had been reached were true. Ex. D, R. 162-165.

The decree approving settlement (Ex. F, R. 172-174), the decree in chancery confirming settlement (Ex. G, R. 174-194), and the order in bankruptcy confirming settlement (Ex. H, R. 195-199), were obviously agreed orders. They must have been drafted by plaintiffs' counsel and approved by the banks' counsel. *The Court will search these decretal orders in vain for even a suggestion of the reservation of the alleged cause of action against the former directors of I.U.I.* Obviously, the banks would not have permitted this attempted reservation to be made a con-

dition of the effectiveness of the release given to them. The final decree in chancery and the final order in bankruptcy confirming the settlement show that the settlement with the banks was unconditional and that the release given to the banks was absolute and contained no attempted reservation of any pretended cause of action against any officer or director of I.U.I. The Court will notice that the final orders entered February 24, 1938, not only released the banks of all claims, demands and causes of action which had been asserted against them in the scores of suits pending in the Federal courts of New York and Illinois, but they released all claims, demands and causes of action which might have been asserted against the banks by debenture-holders or the trustee in bankruptcy of I.U.I. respecting liability of the banks for making loans to and receiving collateral from the corporation in violation of the debenture covenants. (R. 175, 197.) To make the release of the banks doubly certain, all debenture-holders and the trustee in bankruptcy and all parties claiming through them were permanently enjoined from ever instituting any action against said banks on account of any matter involved in the bank suits or upon or in connection with the debentures. R. 177.

B.

The release of the banks from all liability for their part in effecting a pledge of the assets of I.U.I. in alleged breach of the debenture covenants likewise released the former directors of I.U.I.

We do not believe that anyone will seriously contend that the settling banks could not plead the settlement and release in bar of any action which might be brought against them for alleged breach of the covenants of I.U.I. debentures in connection with the deposit of collateral as security for the loans made by the banks to the corporation.

It is so held by the District Court (R. 293) and the Circuit Court of Appeals. (R. 357.) This being established, it follows as night the day that the release of the banks also released the former directors of the corporation for their participation in the commission of the alleged wrong. There is not a case in Illinois which departs from the rule that if there is an actual release of the cause of action against one or more of several joint wrongdoers the cause of action is released against the others. A few of the Illinois cases are *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151; *Mooney* v. *City of Chicago*, 239 Ill. 414, 423; *City of Chicago* v. *Babcock*, 143 Ill. 358, 366; *Emory* v. *Addis*, 71 Ill. 273, 277; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Killham* v. *Chaloupka*, 195 Ill. App. 182, 185; *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Vigeant* v. *Scully*, 35 Ill. App. 44, 46; *Chapin* v. *C. & E. I. R. Co.*, 18 Ill. App. 47, 50. It is universally held that the absolute release of one or more of several joint wrongdoers releases all the rest of them and that an unconditional and consummated settlement with one or more of such wrongdoers is a bar to a suit against any of the rest of them.

In applying the Illinois decisions to the case at bar, we must keep in mind the fact that there was an absolute and unconditional discharge of the banks from all asserted or assertable liability. Certainly, in the light of the final orders entered by the District Court in chancery and in bankruptcy, these plaintiffs or any of the other debenture-holders could not revive any of the many suits against the banks. If any debenture-holder attempted to prosecute any of these suits against the banks, the banks could plead the release as a bar and the debenture-holder would subject himself to prosecution for contempt of court for violating the injunction permanently restraining prosecution of the suits against the banks. This situation was brought about by the action of plaintiffs and the debenture-holders

represented by them in the bank suits. They asked the Court to approve the compromise which released and discharged the banks. They asked the Court to restrain all debenture-holders from prosecuting any suit against the banks for their part in the transactions which they asserted had resulted in a great loss to them. These defendant directors had no part in releasing the banks from this alleged liability and they were not consulted about it during the negotiations for settlement nor were they before the Court in the proceedings which concluded the settlement with and discharge of the banks. Plaintiffs created the situation which they now seek to avoid.

C.

The rule that the release of one of several joint tort feasors releases all of them applies even where there is a reserved intention to look to others for further compensation.

Plaintiffs' counsel, in their petition (p. 27) challenge us "to cite a single case of the Supreme or Appellate Courts of Illinois deciding that in spite of a clause in a release reserving the cause of action against the other joint tort feasors, the reservation clause will be given no effect and the other joint tort feasors will be released." We have met the challenge in the group of cases cited under the preceding point and we could cite many more cases announcing the same rule. The Illinois courts, without exception, state that "the release of one alleged joint tort feasor releases all," and they attach no provisos to the rule. If the joint tort feasor is released, he is released; and the fact that the settling claimant tells the settling defendant that he proposes to sue someone else notwithstanding he is releasing the settling defendant does not limit the legal effect of the release.

Stanley v. *Leahy*, 87 Ill. App. 465, 467, states directly and in unequivocal language that it makes no difference that

the settling claimant intended to release only some of the alleged wrongdoers. Plaintiffs' counsel undertakes to distinguish this case by saying that it involved the sufficiency of a pleading in which plaintiff said merely that she did not intend to release all of the accused when she released some of them, but said nothing to indicate that she expressed this intention to the settling tort feasors. The Court places no such limitation upon its language. It recognizes that neither logic nor law would support a conclusion that makes the rule of release dependent upon a self-serving arrangement by the settling claimant. All of the argument of counsel cannot change the fact that the Illinois Court in this case held squarely and unequivocally that it was altogether immaterial whether the settling plaintiff intended to release all of the wrongdoers by releasing some of them, because it recognized that under the settled law of Illinois all joint tort feasors were released upon the release of one regardless of the intention or agreement of the settling parties to release only some of them.

City of Chicago v. *Babcock*, 143 Ill. 358, makes the situation as to the law in Illinois perfectly clear. There the Court says (p. 366) that "A release to one of several joint tort feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others." The Court then points out that a covenant not to sue is different from a release and does not operate as a discharge of anyone. *As far as Illinois law is concerned, the situation comes down to this: if one is released, all are released; if all are not released, then none is released.* The banks being released, (as the District Court (R. 293) and the Circuit Court of Appeals (R. 357) squarely hold,) then all who acted with the banks in the commission of the alleged wrong are released.

Another Illinois case which holds squarely that the release of one joint tort feasor releases all, notwithstanding the instrument of settlement is cast in the form of a covenant not to sue, is *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312. There the Court seemed to apply the rule which is stated in Section 886 of Restatement of Torts: "The discharge or satisfaction of a judgment against one of several persons, each of whom is liable for a single harm, discharges each of the others from liability therefor." We think that this rule of the Restatement is applicable to the case at bar. The legal effect of the court proceedings which carried out the settlement was a finding by the Court that the banks should cancel their claims and the claims of others filed against the bankrupt estate, aggregating $71,979,083.95, and that they should pay $3,435,088.07 as compensation to the debenture-holders and the bankrupt estate. (R. 138-141.) The final decree entered February 24, 1938, found that the settlement as outlined in the petition had been fully consummated and that the banks had paid the settlement fund and it enjoined the prosecution of any claim against the banks. (R. 177.) The order in bankruptcy entered on the same date found that the banks had paid the amount agreed to be due "in full settlement and compromise of all claims involved," in all the suits against the banks. (R. 196.) The situation is exactly the same as if the case had been tried and the Court had made a finding which resulted in a decree against the banks to cancel their claims and to pay the amount agreed to be paid to the debenture-holders and the trustee in bankruptcy of I.U.I., and the banks had paid the amount decreed and carried out the other terms of the decree. There seems to be no exception to the rule, as stated in Restatement of Torts (Sec. 886), that the discharge or satisfaction of a judgment against one of several persons, each of whom is liable for a single harm, discharges each of the others from liability therefor. The comment on the

section says that the payment of the judgment by one of the wrongdoers, which is accepted by the claimant, discharges the other wrongdoers, even where no judgment has been obtained against the others.

We do not understand that plaintiffs' counsel claim that the debenture-holders could sue the banks again or that their claims against the banks remain in any respect unsettled or unsatisfied. All we understand the claim of plaintiffs' counsel to be is that, the banks having had notice that plaintiffs did not intend to release the former directors of I.U.I. by the release of the banks, the cause of action against present defendants is in some way preserved. We have exactly this situation in *Brown* v. *City of Cambridge*, 85 Mass. 474, quoted with approval in *Chapin* v. *C. & E. I. R. Co.*, 18 Ill. App. 47. The Supreme Judicial Court of Massachusetts, in disposing of the contention of plaintiff in that case that his release of the Cambridge Water Works did not release the City of Cambridge for an alleged wrong, to which both corporations had contributed, because he had told the attorneys for the Water Works that his release of the Water Works did not release the City, said respecting the evidence of this attempted reservation (p. 475):

> "It did not prove that the plaintiff reserved a right to sue the Cambridge Water Works again, or that his claim against them remained in any respect unsettled or unsatisfied. It amounted merely to this: that the plaintiff's counsel at the time of the settlement asserted an intention to sue the City of Cambridge for the tort, and the counsel of the Water Works made no objection to his doing so.
>
> "The defendants contend that the legal effect of this transaction is to discharge them also, and we are of opinion that it has that effect. It is an ancient doctrine that a release to one joint trespasser, or a satisfaction from him, discharges the whole. * * * If it

were not so, a party having a claim against several persons on account of a single tort might sue one and settle the suit, receiving damages; he might then sue another and settle in the same way, and repeat the proceeding as to all but one, and then sue him and recover the whole damage, as if nothing had been paid by the others. A door would thus be opened to a class of speculations that do not deserve encouragement. The rule of law which makes one satisfaction or release a bar to further claims for the same tort is founded in good reason."

Ellis v. *Bitzer*, 2 Ohio 89, 15 Am. Dec. 534, 537, cited with approval in *Vigeant* v. *Scully*, 35 Ill. App. 44, 47, says on this subject:

"That a release of one of several joint trespassers operates a discharge of all, is a position too clear to admit of doubt. * * * Each joint trespasser being liable to the extent of the injury done by all, it follows as a necessary consequence that satisfaction made by one for his liability operates as a satisfaction for the whole trespass, and a discharge of all concerned. * * * The accord and satisfaction mentioned in the third plea operated in law as a discharge of these defendants from liability for the injury complained of by the plaintiff, and it was not in the power of other persons to deprive them, by any agreement of theirs, of the benefit of this legal discharge."

The law of Illinois is squarely against the contentions of petitioners' counsel. We are supported in this view by the decision of two distinguished Illinois lawyers who served for many years on the State bench prior to their appointment to the Federal bench,—Hon. Charles G. Briggle of the United States District Court for the Southern District of Illinois, formerly Judge of the Circuit Court

of the Seventh Judicial Circuit, and Hon. Otto Kerner of the United States Circuit Court of Appeals for the Seventh Circuit, formerly Judge of the Circuit Court of Cook County and by appointment by the Supreme Court a Judge of the Appellate Court for the First District of Illinois.

D.

The rule for which we contend is the only rule which has a foundation in sound logic and established law.

The rule applied by the Illinois courts in situations like the one at bar is neither technical nor harsh. It is founded in reason and justice. A tort claim against several joint wrongdoers is indivisible. All joint tort feasors are liable severally and jointly. There is no right of contribution. When the claimant by compromise agrees with one or more of the joint wrongdoers upon the value of his claim and accepts payment and gives a release, the cause of action is gone. It is the same as if no wrong had ever been done. The claimant has no unsatisfied claim upon which he can recover against anyone.

While the courts in Illinois have accepted the well established rule of release of all upon the release of one joint tort feasor, they have never found it necessary to write a treatise in any opinion in defense of the rule. It is only in recent years that there has been any challenge of the soundness of this long established rule. We submit that it is wholly illogical and unjust to make legal rights of one dependent on the agreement of others. By what process of reasoning can it be said that this settlement with and discharge of the banks with Paragraph K excluded releases the former directors, but with Paragraph K included it still releases the banks but does not release the former directors, notwithstanding the former directors were never consulted and had no part in making the settlement. This just does not add up.

The Illinois Appellate Court, in *Vigeant* v. *Scully,* 35 Ill. App. 44, in support of the general rule followed in Illinois, quotes from *Bronson* v. *Fitzhugh,* 1 Hill N. Y. 185, 186, and adopts in part this paragraph:

> "The reason of the rule seems to be, that the deed, being taken most strongly against the releasor, is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tort feasors, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done."

In the same case the Illinois Appellate Court also adopts the language of the Supreme Court of Maine and quotes with approval from *Kilpatrick* v. *Hunter,* 24 Me. 18, as follows:

> "The difficulty in maintaining the suit against the other is, that the law considers that the one who has paid for the injury occasioned by him, and has been discharged, committed the whole trespass and has occasioned the whole injury, and that he has therefore satisfied the plaintiff for the whole injury which he received."

With all deference due those who hold an opposite view, we cannot see how an argument can be made that the rule of release in joint obligor cases should be the same as the rule in joint tort feasor cases. The difference in the two situations is so obvious and is so well grounded in law and logic that we are surprised that the subject should present any problem. In the joint obligor cases the claim is for an established amount and there is the right of contribution, but in the joint tort feasor cases the claim is unliquidated and there is no right of contribution. If A and B owe C $100 on a note and A pays the $100 he has the right

to a contribution of $50 from B. If A pays only $50 and C accepts it in discharge of half of the debt and retains his claim against B for the other half, B's position is not adversely affected by the settlement between A and C. However, if A and B are liable to C for an assault, there is just one liability for which both A and B are fully responsible with no right of contribution. If A and C agree on the amount of A's liability and A pays the amount agreed upon, and C accepts the sum and A is released by C for all liability, there remains no unsatisfied claim on which C can recover from B. C has fixed the value of his claim and sold it. His cause of action is gone. It cannot be revived as to B by an act of C wholly repugnant to his settlement with and discharge of A. The situation after the settlement is the same as if no wrong had ever been done.

Even in joint obligor cases, if the settling defendant received an absolute and unconditional release, it operates to discharge his co-obligors. (*Parmelee* v. *Lawrence,* 44 Ill. 405, 410.) The Circuit Court of Appeals holds, as we think it must hold under the facts, that there can be no real controversy about whether the banks were absolutely and unconditionally released. (R. 357.) Under all Illinois cases it follows that this discharge of the cause of action against the banks constituted a discharge of the cause of action against the former directors of I.U.I., who acted with the banks in the consummation of the alleged wrong, and is a bar to the prosecution of the instant suit against present defendants.

The just and logical rule that the release of one joint tort feasor releases all, which is so thoroughly established by Illinois law, is not a rule peculiar to Illinois courts. It is the rule applied in the great majority of American jurisdictions. "There is scarcely any dispute among the authorities that, where there is an absolute

release of one, it operates to release all tort feasors who participate in the same act." (*Abb* v. *Northern Pacific Ry. Co.*, 28 Wash. 428, 68 Pac. 954, 957.) "The rule as to the effect of a release may at one time have been somewhat technical; but it has been observed and acted upon, not as a technical rule of the common law, but for reasons of sound policy. A claimant should not be allowed to settle with one of the persons liable to him for his entire claim, if it is valid, and then, having received all he has been able to exact from such party, proceed to speculate by litigation with others, who were no more liable than the first." (*Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 386.) "We cannot agree with the learned counsel that the plea of a release is technical and does not present a meritorious defense. Plaintiff thereby acknowledged full satisfaction of his claim, and he is entitled to have no more. Nor can we assent to the suggestion that a plaintiff should be allowed two satisfactions for one and the same demand. Such a doctrine would shock the moral sense and violate a cardinal maxim of the law, if not the defendant's constitutional right." (*Sircey* v. *Hans Rees Sons*, 155 N. C. 296, 71 S. E. 310, 311.) "Under all the authorities, accepting payment from one or releasing one wrongdoer from payment releases all. * * * The theory underlying the statement of the rule is that the claim is one obligation both joint and several, and whenever the obligation is satisfied as to one it is necessarily released as to the other." (*Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah 298, 249 Pac. 1032, 1035.) "It is an ancient and well established rule, almost without exception in England and America, that for a single injury there can be but one recompense. * * * Having had a reparation from one who was responsible for all the damage and released him, all others who were jointly or jointly and severally liable are also released." (*C. C. C. & St. L. Ry. Co.* v. *Hilligoss*,

171 Ind. 417, 86 N. E. 485, 487.) "However, the injured person has freedom to contract for satisfaction. * * * Compromise, accord and satisfaction are open to him, and he may waive his cause of action. * * * And, when the cause of action is destroyed as to one tort feasor, it falls as to the others, even though it is attempted to preserve the liability of the others." (*MacDonald* v. *Hornblower & Weeks,* 268 Mich. 626, 256 N. W. 572.) "The effect which the law attaches to a release discharging the liability of a wrongdoer is the release of other tort feasors who are jointly liable for the injury. This rule apparently is based upon the nature of their liability, which is one and indivisible. Accordingly, if one of them is discharged, or satisfies the cause of action, there remains no foundation for an action against anyone." (*Muse* v. *DeVito,* 243 Mass. 384, 137 N. E. 730, 731.) "Plaintiff's general release operated not only *in personam* on the releasees and their liability, but also *in rem* on the releasor's cause of action. * * * The entire cause of action being gone, no one can remain liable." (*Smith* v. *Mann,* 184 Minn. 485, 239 N. W. 223, 224.) "Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. * * * If it [the payment made] be accepted in satisfaction of the cause of action against the one, it is in law, a satisfaction of the claim against them all." *Chetwood* v. *California Natl. Bank,* 113 Cal. 414, 45 Pac. 704, 707.

This rule of release applied by the Illinois courts throughout the history of the State is "the better rule," (*McBride* v. *Scott,* 132 Mich. 176, 93 N. W. 243, 245,) is "founded in good reason", (*Brown* v. *City of Cambridge,* 85 Mass. 474, 476,) and is "a salutary rule of law". (*Rust* v. *Schlaitzer,* 175 Wash. 331, 27 Pac. (2nd) 571, 573.) We ask this Honorable Court to consider that these defendants are not asking for the application of a harsh and

technical rule but for the application of a just and logical rule which was thoroughly established by the courts of Illinois and of most, if not all, of the States of the residence of the debenture holders at the time this settlement was made and the banks were released. The very language of Paragraph K of the petition for approval of the settlement indicates that plaintiffs' counsel were thoroughly familiar with this rule when they advised their clients to accept the settlement with the banks and discharge them from all further liability. The present situation is their own creation. A discharge is a fact which cannot be explained away as against one whose interests may have been affected by it.

II.

The summary judgment motion applies to the liability of defendant directors for pledging of collateral for loans made by the New York banks for the same reason that it applies to the transactions with the Chicago banks.

There are at least three conclusive answers to the argument made by plaintiffs' counsel under Division II. (Pet. 31.)

First: This effort of plaintiffs' counsel to distinguish between the effect of the settlement as to the transactions with the Chicago banks is an afterthought. This point was not made on the hearing in the District Court and so there was no ruling on the point and nothing is preserved for review respecting the point. Furthermore, there is no assignment of error on the record which presented the point to the Circuit Court of Appeals for decision. An examination of the assignment of errors (R. 324-327) will disclose that there is not even a suggestion of this claim of plaintiffs' counsel, advanced for the first time when they filed the brief of appellants in

the Circuit Court of Appeals. In the absence of an assignment of error covering the point, there is nothing before this Court for consideration.

Second: If the point were before the Court, it is without merit because it is based on a false assumption of fact. The Court will note from an examination of the petition for decretal order that the first suit mentioned is No. 12397, which was a suit in equity pending in the United States District Court for the Northern District of Illinois, Eastern Division, brought by plaintiffs against *the five New York banks* and the five Chicago banks and Bigelow, trustee. (R. 116.) The Court will also note that among the New York equity suits, one that was not tried before Judge Mack, is a suit by DeVol pending in the United States District Court for the Southern District of New York against the New York banks, the General Electric Company, and Bigelow, trustee. (R. 122.) This is the same plaintiff who instituted a similar suit in her own behalf and on behalf of debenture-holders who had deposited debentures with the McDevitt-Goldsborough Committee and on behalf of all other owners of I.U.I. debentures in the United States District Court for the Northern District of Illinois against the Chicago banks. (R. 118.) The Illinois suit of present plaintiffs against the New York and Chicago banks and the New York suit by other debenture-holders on behalf of all, including present plaintiffs, against the New York banks, were included in the settlement and were dismissed pursuant to the settlement. (R. 137.) There were also pending in New York against the New York banks five preference suits by Bigelow, trustee (R. 125-126), which were included in the settlement. (R. 137.) The decree in chancery, (R. 174-179,) and the order in bankruptcy, (R. 195-199,) disposed of all pending suits that were described in the petition, which certainly included the half dozen suits pending in New York and the suit pending in Illi-

nois in which the New York banks were named as defendants. In addition to these suits concerning the affairs of I.U.I., there was included in the settlement, disposition of several equity suits pending in New York against the New York banks growing out of the affairs of Corporation Securities Co. of Chicago (R. 129-130), and some preference suits pending in Illinois against the New York banks. (R. 134.) The comprehensive settlement described in the petition covered transactions of the New York and Chicago banks with Corp. as well as those with I.U.I. (R. 136-137.) The petition stated that all claims involved in the New York equity suits as well as the Chicago equity suits would be settled upon the payment in cash of $3,435,088.07 and the withdrawal of claims amounting to $71,979,083.95 by the banks, (R. 137-138,) and that the New York preference suits would be dismissed and releases of all claims against the New York banks and the Chicago banks involved in said suits would be delivered upon the completion of the settlement (R. 141), and that the Court should decree upon the consummation of the settlement "that all claims and suits whatsoever against the Chicago banks and the New York banks or any of them on account of any matter or thing mentioned or involved in said Chicago equity suits or New York equity suits be forever barred, and that all holders and owners of said debentures of Insull Utility Investments, Inc. and said Bigelow as trustee, be enjoined and restrained from instituting any suits at law or in equity against the Chicago banks or the New York banks or any of them, and that the claims of such debenture-holders against the banks be limited to said settlement fund." (R. 147.) The settlement was carried out and confirmed. (R. 174-179; R. 195-199.) Thus it appears that the whole argument of plaintiffs' counsel falls of its own weight because it is not true that all the suits pending against the New York banks had been dis-

missed by the New York District Court before the settlement.

Third: Even as to the six suits against the New York banks which were tried before Judge Mack, plaintiffs still had pending claims. If the appeal from the decision of Judge Mack dismissing their complaints had terminated in favor of the debenture-holders and a new trial had been ordered, there would have been no decree and the debenture-holders would have been restored to exactly the same position they were in before Judge Mack decided the case against them. (*Wright* v. *Griffey*, 47 Ill. App. 577, 578.) Plaintiffs take a strange position in arguing they had no claims against the New York banks after having accepted from them more than a million dollars in settlement of their claims. If there were no suits pending against the New York banks, then why did plaintiffs take money from these banks and give releases pursuant to the settlement agreement which in terms covered pending suits against the New York banks as well as the Chicago banks.

The point has been squarely decided in *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, where the Court said (p. 312):

> "A release of liability of one joint tort feasor will inure to the benefit of the others, either before or after suit is brought and pending judgment or after judgment has been entered, where tortious conduct is made the basis of a claim or action."

III.

The former directors of I.U.I. (respondents here) and the settling pledgee banks acted jointly in the pledging of the assets of I.U.I. and consequently all contributed to the consummation of the wrong to the creditors of I.U.I., if wrong was done. The District Court and the Circuit Court of Appeals, in sustaining the motion for summary judgment, were right in applying the well established rule of release of all by the release of one or more of several alleged joint wrongdoers.

We now come to that phase of the argument of petitioners which amounts to an attempt to show that the settling banks did not contribute to the commission of the wrong for which the debenture-holders seek to recover from the former directors of I.U.I. This is pounding on the log after the coon is gone. It has been repeatedly held that a claimant cannot take the position that one who buys his release is not guilty. When one releases an alleged wrongdoer he cannot explain away the effect of his release nor can he make the excuse that those who settled were not in fact wrongdoers when the release is pleaded as a release of others who contributed to cause the alleged injury.

In *Chapin* v. *C. & E. I. R. Co.*, 18 Ill. App. 47, the Court quotes with approval *Leddy* v. *Barney*, 139 Mass. 394, 2 N. E. 107, as follows (p. 51):

> "The rule that a release of a cause of action to one of several persons liable operates as a release to all, applies to a release given to one against whom a claim is made, although he may not be in fact liable. The validity and effect of a release of a cause of action do not depend upon the validity of a cause of action. If the claim is made against one and is re-

leased, all who may be liable are discharged, whether the one released was liable or not."

Plaintiffs (petitioners here) will not now be permitted to take the position that the settling wrongdoers did not contribute to the injury which it is charged resulted from wrongs committed by present defendants, nor can they explain away the effect of the settlements by claiming that they were collecting for something other than the damages suffered by them. *Guth* v. *Vaughan,* 231 Ill. App. 143; *C. C. C. & St. L. Ry. Co.* v. *Hilligoss,* 171 Ind. 417, 86 N. E. 485, 488; *Martin* v. *Setter,* 184 Minn. 457, 239 N. W. 219, 222; *Allen* v. *Ruland,* 79 Conn. 405, 65 Atl. 138, 140; *Kirkland* v. *Ensign-Bickford Co.,* 267 Fed. 472, 475.

The law fixes the rights of defendants (respondents here) and if there was in fact a release of the settling banks and if these settling banks were in fact actors in the chain of events which resulted in the claimed injury, then these defendants are entitled to the benefit of the releases given to the settling banks by the plaintiffs. *Vigeant* v. *Scully,* 35 Ill. App. 44, 47, citing *Bronson* v. *Fitzhugh,* 1 Hill (N.Y.) 185, 186; *Smith* v. *Mann,* 184 Minn. 485, 239 N.W. 223, 224; *Muse* v. *DeVito,* 243 Mass. 384, 137 N.E. 730; *MacDonald* v. *Hornblower & Weeks,* 268 Mich. 626, 256 N.W. 572; *Kaplowitz* v. *Kay,* 70 Fed. (2nd) 782, 783; *Spiess* v. *Sommarstrom Ship Building Co.,* 272 Fed. 109, 111; *Babcock & Wilcox Co.* v. *Pioneer Iron-Works,* 34 Fed. 338, 341.

People v. *Becker,* 253 Ill. 131, cited by petitioners in support of their contention, merely holds that the satisfaction of a judgment on two state warrants, illegally drawn by the State Auditor to himself and paid to him by the State Treasurer, was not a bar to an action against the estate of the State Treasurer on other warrants drawn by the State Auditor, payable to the State Treasurer, and paid by the State Treasurer to himself. Here we have a

case dealing with two constitutional officers whose respective duties are prescribed by law and who have separate and distinct obligations to the public. In this situation the Court expressly held that the wrongful acts of each officer were several as to the drawing and the paying of the respective warrants and that they were not joint tort feasors.

Veazie v. *Williams*, 49 U.S. 134, another case upon which petitioners rely, merely holds that an arrangement made with an auctioneer, who had defrauded a purchaser by running up the price with fictitious bids, under which the auctioneer testified for the purchaser in his suit against the sellers, was merely a covenant not to sue and was not a release which would bar a suit against those who had benefited by the fraudulent acts of the auctioneer. Petitioners rely on the dictum that the accountability of the sellers and the auctioneer rested on different grounds and that in equity a release of one of them would be limited to the one passing the consideration for the release.

Whatever the law is elsewhere, it is the settled law of Illinois that where two or more persons each contribute to cause a single injury, the release of one releases all. It is immaterial whether they were joint tort feasors. It is enough if they were both liable for the same injury.

One of the early Illinois cases is *Chapin* v. *C.&E.I. R. Co.*, 18 Ill. App. 47, which involved a train collision. There the Court said (p. 50):

> "It is conceded that the action in this case is brought to recover for the same injury for which settlement has been made with the Wabash Company, but it is insisted that the two companies were not joint tort feasors, were therefore not jointly liable, and that the release of one does not have the effect of discharging the other from liability to the plaintiff. Whether

they were joint tort feasors or not, we do not deem it important in the view we take of the case, to decide. It is enough if they were both liable for the same injury. * * * (p. 51) If this be so, then a release to one discharges both."

A second Illinois case is *Vigeant* v. *Scully,* 35 Ill. App. 44, in which Vigeant, an architect, sued for damages alleged to have arisen through his negligence in failing to properly supervise construction of a building, defended on the ground that the judgment in favor of Kaiser, the building contractor, in an action against Scully, the owner, for the amount claimed to be due, to which action Scully had made the defense that Kaiser's work was defective, constituted a release of all who contributed to the alleged wrong. There the question of whether the builder and the architect acted jointly was involved. The Court disposed of it by saying (p. 47):

"If the injury had been caused by the joint negligence of Vigeant and Kaiser, there would be no difficulty whatever in yielding this point, because it is established law that the release of one of two joint wrongdoers, or satisfaction received from one, is a release or satisfaction as to all.

* * *

"Here is a wrong for which two persons are severally, and not jointly, amenable. One of them makes complete reparation. Can the injured party demand anything more from the other tort feasor? The foundation for such a demand would seem to be removed. One atonement is all the law exacts. That having been made, 'it is as though the wrong had never been done'. Those who have acted separately in committing the injury, can be in no worse situation than they who, having acted jointly, are, by the election of the injured person, made separate trespassers."

The complaint against the banks (Ex. A to the motion for summary judgment) alleges that the banks wrongfully made loans to I.U.I. and wrongfully demanded and took pledges of assets of I.U.I., (Pars. 19-20, R. 96-100) and further alleges that the banks were fully informed with respect to the provisions of the debentures and that they knowingly made the loans in violation of the protective covenants, (Pars. 25-34, R. 102-107) and in general alleges that the banks by their wrongful conduct rendered themselves liable to account to the debenture-holders for all of the assets taken by them in pledge and all proceeds thereof and accretions thereto, and prays that there be entered against the banks "a judgment for the full, fair market value of said securities, dividends and accretions as at the highest value thereof at any time subsequent to the wrongful transfer thereof." R. 113.

If it be conceded that I.U.I. stood in the relation of a trustee to the debenture-holders and if the banks, in dealing with I.U.I. assisted it in the violation of its trust, then the banks were liable with I.U.I. and its officers and directors for any injury caused the debenture-holders. It is well established that those dealing with persons acting in a fiduciary character are at all times required to take notice of that fact, and they cannot act for their own advantage in disregard of the fiduciary relation which actually exists. Accepting as true the allegations of the complaint of the debenture-holders against the banks and the allegations of the complaint of the debenture-holders against the former directors of I.U.I., it appears clear that the only alleged wrongdoers who could have had a motive for inducing I.U.I. to make wrongful loans were the banks. It was to the self-interest of the directors to protect I.U.I. from wrongful borrowings and pledgings. There is a complete absence of motive for wrongdoing on the part of the respondents here.

CONCLUSION.

We shall not extend this brief in opposition to the petition for writ of certiorari by presenting an argument in support of all the reasons relied upon to support the decree of the District Court and the judgment of the Circuit Court of Appeals in ruling in favor of the defendants. The reasons assigned in the memoranda of holdings of the District Court (R. 290-294) and in the opinion of the Circuit Court of Appeals (R. 355-357) are sound and well supported by the decisions of the courts of Illinois and of most other American jurisdictions, as we have demonstrated in our argument. But there are other equally strong reasons why the judgment must be for the defendants. The complaint fails to allege facts which show that the requisite jurisdictional amount is involved, (See cross-petition, No. 823, pp. 24-25,) the plaintiffs were collusively selected to create an appearance of diversity of citizenship which does not in fact exist, (cross-petition, pp. 25-28,) and this suit against former directors was commenced without authority and without the knowledge of the named plaintiffs. (Cross-petition, pp. 28-32.) It nowhere appears that any plaintiff was a creditor of I.U.I. when the alleged wrongful pledgings were made. (Cross-petition, pp. 18-19.) Furthermore, the settlement with and release of the four co-defendant directors against whom exactly the same charges were made as are made against these remaining defendants effected a discharge of all defendant directors from all causes of action alleged. Cross-Petition, pp. 32-35.

Finally, there is a complete absence of necessary allegations to state a cause of action against respondents or any of them on account of the alleged violation of debenture covenants in pledging securities as collateral for bank

loans. Under its charter I.U.I. had a legal right to make investments in securities. It was legitimate for it to borrow money. There is no allegation in the complaint that I.U.I. did not receive full consideration for every loan made and there is no claim that the funds so received were not used properly in the conduct of the business of the corporation. There is no allegation that the debts enumerated in Paragraph 30 of the complaint were the creation of indebtedness in excess of the amount of the capital of the corporation. There are no allegations of fact that the bank loans did not come within the exceptions of the debentures—(a) allowing the Company to pledge its assets for the purpose of securing loans contracted in the usual course of business for periods not exceeding one year, and (b) allowing such pledgings to secure the purchase price of property acquired. Despite the general allegations of fraud and wrongful conduct, this case rests only on the claim that the bank loans were made and the assets of I.U.I. were pledged in breach of the debenture covenants. The complaint does not state this cause of action.

The petition does not show any of the reasons stated in Rule 38(5) which entitle petitioners to a review on a writ of certiorari by this Honorable Court. Wherefore, the petition should be denied.

Respectfully submitted,

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago

WALTER BREWER,
EDWARD J. FARRELL,
231 South LaSalle St., Chicago,
Solicitors for Respondents.

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No. 822

IN THE

SUPREME COURT OF THE UNITED STATES

AT THE OCTOBER TERM, 1941

DE MET'S INCORPORATED,
Plaintiff-Petitioner,

AND

ROBERT E. WOOD,
Intervenor-Petitioner,

VS.

SAMUEL INSULL, JR., ET AL.,
Defendants-Respondents.

Answer to Petition for Writ of Certiorari.

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

JOHN J. HEALY,
135 South LaSalle St., Chicago,
Solicitors for Respondents.

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Defendants-Respondents.

Answer to Petition for Writ of Certiorari.

To the Honorable the Supreme Court of the United States:

The petitioners have not made an accurate statement of the case.

The complaint in this case against the former directors of Corporation Securities Co. of Chicago (R. 2-15) is even less sufficient in its allegations of fact than the complaint in the *Aiken* case (No. 821 here) against the former directors of Insull Utility Investments, Inc. Following the miscellaneous matter of inducement, the complaint in this

case, as to the cause of action for pledging contrary to the note covenants, alleges merely that the corporation proceeded to borrow money and pledge its property without providing in the instrument creating the pledge that the note-holders should be equally and ratably secured thereby, (Par. 23, R. 10,) that none of the pledges were made to secure the purchase price or any part thereof of the property so pledged, (Par. 25, R. 11,) that the pledges were made at a time when the liabilities exceeded fifty percent of the then value of its assets, (Par. 27, R. 11,) that the corporation was pursuing no course of business which required the borrowing of large sums of money, (Par. 29, R. 11,) that despite the wording of the terms of the notes evidencing said loans none of said loans were made for a period not exceeding one year, (Par. 30, R. 11,) and that each of said loans and pledges was wrongfully authorized, approved and ratified by the defendants. Par. 31, R. 11.

The notes contain the following covenant:

> "The Company does hereby expressly covenant that, as long as any note of this issue of Serial Gold Notes is outstanding and provision for the payment thereof shall not have been made; (a) it will not mortgage, pledge or otherwise incumber any of its assets without securing the notes of this issue equally and ratably, with the other obligations secured or to be secured by such mortgage, pledge or incumbrance; except that the Company, without so securing the notes, may mortgage, pledge or otherwise incumber any of its assets for the purpose of securing loans in the usual course of business, for periods not exceeding one year, and may mortgage, pledge or otherwise incumber property hereafter acquired to secure the purchase price thereof in whole or in part; (b) will neither pay cash dividends on its Common Stock nor redeem or purchase its capital stock of any class in whole, or in part,

when the effect of such payment or redemption or purchase would be to reduce the value of its assets to less than one hundred fifty percentum of its indebtedness then outstanding; and (c) it will not create or assume any additional indebtedness if as a result thereof its total indebtedness will exceed fifty per centum of the then value of its assets, such value to be determined by a certified public accountant or firm of certified public accountants who shall be selected by the Company and be approved by the Registrar." Par. 11, R. 6-7.

The complaint against the defendants as former directors of Corp. was filed January 30, 1933. (R. 2.) Motions to dismiss were filed by the several defendants in 1933, (R. 17-38,) and these were continued generally on the motion of plaintiffs in January, 1934. These motions were sustained as to all alleged causes of action except that based on wrongful borrowing and pledging on March 7, 1940. (R. 317.) There was no necessity to rule on the motion to dismiss as to the excepted cause of action after the motion for summary judgment was allowed as to it. (R. 316.) This motion for summary judgment was filed October 2, 1939, and it asked that a judgment in bar be entered as to the cause of action grounded on the alleged breach of covenants of the Corp. notes for the reason that it had been released as to the former directors of Corp. by a settlement with and release of the lending banks. (R. 56.) The motion was supported by an affidavit respecting the settlement (R. 57) to which was attached the complaint in the suit against the Continental Bank, (R. 58-104,) the petition for decree approving settlement, (R. 105-136,) the order providing for notice and hearing, (R. 137-151,) the answer of the Chicago banks in the consolidated case, (R. 152-155,) the findings of fact and conclusions of law, (R. 156-187,) the decree approving the settlement, (R.

188-190,) the decree in chancery confirming the settlement, (R. 191-204,) the order in bankruptcy confirming the settlement, (R. 205-209,) and the release and transfer of title to the pledged collateral. R. 210-224.

The complaint in *Gregory* v. *Continental Bank,* (R. 58-104,) which is the case in which the settlement proceedings were recorded, includes all the charges against the former directors of Corp. which are made in the complaint at bar and many more. In both suits the complaint purports to be on behalf of all note-holders of Corp. and to be based on the *single* wrong of breaching the note covenants in transactions between the bank and the corporation. Significant among the allegations of the complaint in the settled case are that the bank knew of the actual purpose of the organization of Corp., (Par. 9,) that a subsidiary of the bank was one of the underwriters which marketed the notes containing the covenants, (Par. 16,) that the bank knew that the proceeds of the notes would not meet the corporation's existing commitments, and that the corporation would have to resort to bank loans, (Par. 18,) that contemporaneously with the sale of the notes Corp. was selling a large issue of stock, and that directors of the bank, including two who were also directors of Corp., were subscribers to the stock syndicate, (Par. 19,) that two of the executive officers of the bank were speculating in Insull securities before Corp. was organized and later when the loans were made and the pledges were accepted by the bank, (Par. 20,) that the bank knew that the proceeds of the bank loans were being used by Corp. in stock market support, (Par. 27,) that the bank and some of its officers and directors were personally interested in maintaining the Insull companies with an appearance of solvency, (Par. 21,) that loans were made and assets pledged for the purpose of keeping up an appearance of solvency of Corp. and other companies of the Insull Group because the bank had

outstanding loans aggregating many millions secured only by Insull securities, (Par. 26,) that after the market crash in October, 1929, the banks made huge loans to Corp. to maintain market prices of stock which the banks held as collateral to loans and in which bank officers were speculating, (Par. 37,) and that two of the bank's directors were also directors of Corp. and other Insull companies and knew about the plans and doings of these companies when the bank made the loans to and received assets in pledge from Corp. (Par. 22.) The prayer is that the bank be compelled to cancel all loans and surrender all pledged assets, and for general relief. R. 95.

After Corp. went into bankruptcy a score of suits were filed against the banks by the trustee in bankruptcy and by different groups of note-holders. (R. 106-107, 111, 121-122.) After negotiation it was agreed that all claims of the note-holders and the trustee in bankruptcy be compromised and settled, (R. 126,) and a decree was entered in chancery confirming in the banks title to the collateral pledged to them free from all claims asserted or assertable by the note-holders or by the trustee arising out of or in any manner connected with the pledging (R. 192) and permanently enjoining the note-holders from instituting or prosecuting any suit against the banks on account of such pledging, (R. 194,) and an order was entered in bankruptcy reciting that the settlement had been fully carried out by the payment of $1,200,000 and the performance of other terms of the settlement "in full settlement and compromise of all claims involved" in all of the pending suits, (R. 205,) and it was ordered that the acts of the trustee in bankruptcy in carrying out the settlement be approved and that he deliver releases to all of the banks, (R. 207-208,) and a general release and transfer was executed and delivered to the banks by such trustee. R. 210-215.

Reasons for Denial of the Writ.

1. The decision of the Circuit Court of Appeals with respect to the release of the alleged cause of action against the former directors of Corp. arising out of the alleged pledging of assets by Corp. in violation of note covenants by virtue of the release of the banks for their participation in said pledging follows the decisions of the courts of Illinois. Under the settled law of Illinois the release of the settling banks released the former directors of Corp. as to all causes of action asserted or which might have been asserted by the note-holders for or on account of the alleged wrongful pledging of the assets of Corp. as collateral to the bank loans. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Guth* v. *Vaughan*, 231 Ill. App. 143; *Killham* v. *Chaloupka*, 195 Ill. App. 182, 185; *Gore* v. *Henrotin*, 165 Ill. App. 222, 224; *Vigeant* v. *Scully*, 35 Ill. App. 44, 46; *Chapin* v. *C. & E. I. Ry. Co.*, 18 Ill. App. 47, 50.

2. The rule established by the Illinois decisions applies where all alleged wrongdoers contributed to a single injury, even though they acted severally. It would be difficult to conceive of a complaint containing more definite, comprehensive and serious charges of wrongdoing than those stated in the complaint in *Gregory* v. *Continental Bank*, which is the case in which the settlement proceedings were carried out. The mere addition of the names of the former directors of Corp. as parties to that suit would have changed the suit against the Continental Bank *only* to an action charging the bank and these defendants *jointly* for the alleged wrong. All the causes of action asserted or assertable in the complaint in *Gregory* v. *Continental Bank* and similar complaints against another Chicago bank and certain New York banks were fully compromised, satisfied and released by the note-

holders and the trustee in bankruptcy. Under the law established by the Illinois courts and the courts of other American jurisdictions, this unconditional release of the banks released the former directors of Corp. (respondents here), who were charged with acting with the banks in the commission of the alleged wrongs connected with the borrowings and pledgings.

3. The Circuit Court of Appeals does not hold that the banks and the former directors of Corp. were jointly liable as tort feasors and it is the settled law of Illinois that the application of the rule of release of all by the release of some of several alleged joint wrongdoers is not confined to cases where the alleged wrongdoers are jointly liable. The rule applies where all contributed to the same injury even though they acted severally. *Chapin* v. *C. & E. I. Ry. Co.*, 18 Ill. App. 47, 50; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Wagner* v. *C. & A. R. Co.*, 265 Ill. 245, 251; *Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah 298, 249 Pac. 1032, 1034; *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 385; *DeCock* v. *O'Connell*, 188 Minn. 228, 246 N. W. 885, 887; *Muse* v. *DeVito*, 243 Mass. 384, 137 N. E. 730, 731; *First & Merchants National Bank* v. *Bank of Waverly*, 170 Va. 496, 197 S. E. 462, 465.

4. The statement that the decree approving the settlement with the banks was entered on the express condition that the cause of action against the former directors of Corp. would be preserved is directly contrary to the facts. It is immaterial that the settling note-holders who petitioned for the decree intended to release only the banks. There is no dispute among the authorities that where there is an absolute and unconditional release of one of several alleged wrongdoers it operates to release all who participated in the same act. *Stanley* v. *Leahy*, 87 Ill. App. 465, 467; *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, 312; *Bee* v. *Cooper*, 217 Cal. 96, 17 Pac. (2nd) 740,

741; *McBride* v. *Scott,* 132 Mich. 176, 93 N. W. 243, 244; *Rust* v. *Schlaitzer,* 175 Wash. 331, 27 Pac. (2nd) 571; *Thompson* v. *Fox,* 326 Pa. 209, 192 Atl. 107, 109; *Ducey* v. *Patterson,* 37 Colo. 216, 86 Pac. 109; *Gholson* v. *Savin,* (Ohio,) 31 N. E. (2nd) 858, 863.

In addition to the grounds assigned by the District Court and the Circuit Court of Appeals in sustaining the motion for summary judgment there are other equally well-supported grounds why a decree for defendants must be entered with respect to the alleged cause of action grounded on the pledging of assets of Corp. as security for bank loans.

5. The complaint fails to allege facts which show that the requisite jurisdictional amount is involved. Plaintiff says it owned notes of the face amount of $20,000 when it filed the complaint. (Par. 10, R. 6.) But it does not allege when it acquired these notes except that it acquired them before maturity, which may have been any time before suit was commenced; nor what it paid for them except that it was something of value; nor that it owned them when the challenged pledging took place; nor that it has been damaged to the amount of $3,000 or in any other amount. The complaint must affirmatively and positively allege facts which show that the jurisdictional amount is present and the allegations cannot be helped by presumptions or argumentative inferences. (*Norton* v. *Larney,* 266 U. S. 511, 515; *Hanford* v. *Davies,* 163 U. S. 273, 280.) This is not a true class action, (*Ayer* v. *Kemper,* 48 Fed. (2nd) 11, 14,) and it must be dismissed as to each plaintiff who does not individually and severally allege affirmatively and distinctly that he has a claim in excess of $3,000. *Ogden* v. *Armstrong,* 168 U. S. 224, 232; *Russell* v. *Stansell,* 105 U. S. 303, 304.

6. There is no allegation that plaintiff was a creditor at the time of the alleged wrongful borrowings and pledg-

ings. For all that appears from the complaint plaintiff may have acquired the notes after the corporation was declared a bankrupt. Courts do not encourage speculation by litigation. Because of the failure of the complaint to show that plaintiff held its notes at the time of the challenged transactions plaintiff has failed to state a cause of action. *Graham* v. *Railroad Co.*, 102 U. S. 148, 153; *Chicago Daily News Co.* v. *Siegel*, 212 Ill. 617, 629.

7. The complaint alleges no facts to show that the borrowings and pledgings were in violation of the note covenants. All the allegations as to this cause of action are mere conclusions of the pleader. *Van Weel* v. *Winston*, 115 U. S. 228, 237; *Sterling Gas Co.* v. *Higby*, 134 Ill. 557, 568; *Bosworth* v. *Van Lanningham*, 293 Fed. 875, 877.

CONCLUSION.

We shall not extend this answer in opposition to the petition for a writ of certiorari by presenting an argument in support of the reasons relied upon to support the decree of the District Court and the judgment of the Circuit Court of Appeals in ruling in favor of the defendants. The reasons assigned in the memorandum of holdings of the District Court (R. 292-296) and in the opinion of the Circuit Court of Appeals in the *Aiken* case, adopted in this case, (R. 349-352,) are sound and well supported by the decisions of the courts of Illinois and of most other American jurisdictions, as we have demonstrated in our answer in *Aiken et al.* v. *Insull et al.*, No. 821.

The petition does not show any of the reasons stated in Rule 38(5) which entitle petitioner to a review on a

writ of certiorari by this Honorable Court. Wherefore, the petition should be denied.

Respectfully submitted,

CONRAD H. POPPENHUSEN,
EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
11 South LaSalle St., Chicago,

JOHN J. HEALY,
135 South LaSalle St., Chicago,
Solicitors for Respondents.

(12)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

SAMUEL INSULL, JR., ET AL.,
Cross-Petitioners,

No. 824. *vs.*

DE MET'S, INCORPORATED,
Cross-Respondent.

STANLEY FIELD,
Petitioner,

No. 827. *vs.*

DE MET'S, INCORPORATED,
Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION AND TO PETITION FOR WRIT OF CERTIORARI.

EDMUND D. ADCOCK,
33 North La Salle Street,
Chicago, Illinois,

ROGER Q. WHITE,
120 South La Salle Street,
Chicago, Illinois,

LEWIS F. JACOBSON,
33 North La Salle Street,
Chicago, Illinois,

GEORGE F. CALLAGHAN,
105 West Adams Street,
Chicago, Illinois,

ALBERT W. FROEHDE,
77 West Washington Street,
Chicago, Illinois,
Counsel for Respondents.

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BRIEF IN OPPOSITION TO CROSS-PETITION AND TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD.

This brief is being filed, to avoid duplication, in opposition to both the cross-petition in No. 824 and the petition for writ of certiorari in No. 827, inasmuch as both of said

petitions are addressed to the same judgment of the Circuit Court of Appeals and raise substantially the same questions, No. 827 being filed by Stanley Field, one of the defendants below, and No. 824 being filed by the other defendants.

The judgment sought to be reviewed by these petitions is that portion of the judgment of the Circuit Court of Appeals (R. 359) which reverses the judgment entered by the District Court, wherein the District Court sustained motions to dismiss the complaint as to the cause of action under Section 23 of the Illinois Corporation Act of 1919 relating to dividends and refused to permit amendments and thereupon dismissed the complaint as to that cause of action for want of equity (Decree, R. 316).

The facts and questions in this case and in the case of *Samuel Insull, Jr., et al.* v. *Thomas D. Aiken, et al.*, No. 823 in this Court, are similar and the two suits are related. They were heard jointly in the District Court and a joint Memoranda of Holdings was filed by that Court (R. 292). Likewise, the Circuit Court of Appeals heard the two matters jointly and by reference incorporated its opinion in the *Aiken* case in its opinion in the *DeMet's* case (R. 346). Some of the petitioners in No. 824 (Stuart and Insull, Jr.) are also petitioners in No. 823.

As stated by the Circuit Court of Appeals, the complaints in both suits, in substance, make the same allegations (R. 344). The differences in the facts in the two suits are primarily in respect to the name of the company involved, the names of the plaintiffs and defendants, dates of various events and amounts. The suit of DeMet's Incorporated (Nos. 824 and 827) is against the directors of Corporation Securities Co. of Chicago, while the suit of Thomas D. Aiken, et al. (No. 823) is against the directors of Insull Utilities Investments Inc.

The petitions for certiorari filed in this case are not so

broad as those filed in the *Aiken* case. The petition in No. 827 is limited to certain of the points raised in Point I of the cross-petition in No. 823 and answered in Point I of our brief in opposition in No. 823, which is hereby adopted to supplement this brief.

The cross-petition in No. 824 is limited to the points raised in Points I and II of the cross-petition in No. 823 and answered in Points I and II of our brief in opposition in No. 823, which is hereby adopted to supplement this brief.

The Supreme Court should not grant certiorari for the reason that the judgment attacked is not final.

The argument on this point is substantially the same as stated in the opening of the opposition brief filed by the respondents in case No. 823, which argument is hereby adopted.

However, we shall proceed to answer the arguments in the briefs filed in No. 824 and No. 827 in the same order in which they were presented in those briefs.

ARGUMENT AS TO INSULL, ET AL. v. DE MET'S, NO. 824.

I.

The Circuit Court of Appeals correctly held that a cause of action was stated under the Illinois statute for declaring or assenting to dividends in impairment of capital or while insolvent and that the plaintiffs should have been given leave to file proffered amendments to the complaint.

This matter is fully argued in Point I of the opposing brief in No. 823, which is hereby adopted. The complaint here alleges that the company had no surplus at any time during the years 1930, 1931 and 1932, and nevertheless the company paid cash dividends during each of these three years on all classes of its preferred stock, the exact amounts of which cash dividends are unknown to plaintiff (R. 12, Par. 33). The complaint also alleges that for a long time prior to April 18, 1932 (date of bankruptcy), the company was wholly insolvent and that on that date its liabilities aggregated over $56,000,000 and its assets about $12,000,000 (R. 7-8). It also alleges that the directors authorized or ratified the payment of dividends as above set forth, thereby rendering themselves liable under the statute to plaintiff and all other creditors (R. 12, Par. 34). For the reasons stated in Point I of the opposing brief in No. 823, these allegations of the original complaint are sufficiently specific to charge all defendants for all dividends paid in impairment of capital or while insolvent. As held by the Circuit Court of Appeals, even though lacking in details it was not fatally deficient (R. 346, 355). The details are stated in full in the proffered amendments (R. 301).

Petitioners point out that the original complaint in this suit said nothing about an Executive Committee and the

connection of the defendants therewith and therefore, they complain that the Circuit Court of Appeals, in its opinion, improperly assumed those facts. Petitioners are mistaken in that respect. The Circuit Court of Appeals was referring to the amendments to the complaint in which the facts concerning the Executive Committee are alleged in detail. Even without any allegations in the original complaint in this cause concerning the Executive Committee, the complaint is no less sufficient, inasmuch as it alleges that the directors "authorized or ratified the payment of dividends as set forth above and thereby rendered themselves liable under the statute" (R. 12, Par. 34). This adequately put defendants on notice that they were being sued for their liability under the statute for declaring or assenting to the dividends. Furthermore, all of the details as to when and how and by whom the dividends were declared or assented to are fully stated in the amendments.

The suit is clearly in behalf of all creditors (R. 2). The prayer is for an accounting and judgment against defendants in favor of the plaintiff and "others similarly situated" (R. 14).

Petitioners' argument that it is nowhere alleged that plaintiff was a creditor at the time the dividends were declared and paid is utterly without foundation. The complaint in the cases at bar alleges that DeMet's Incorporated purchased on or about September 1, 1930, and at the time of filing the suit still owned, $20,000 of the $31,500,000 of Serial Gold Notes issued and sold by Corporation Securities Co. to the public, including plaintiff, at approximately par (R. 6). From the above it clearly appears that plaintiff owned its notes during the entire period when dividends were declared and paid and that it purchased the notes at about par.

The question as to delay in presenting the amendments is the same as in case No. 823. In both cases the delay was acquiesced in by both sides and the intervening period

was devoted to suits against banks and their settlement (R. 39, 307, 338). The District Court passed on the amendments in both cases jointly (R. 292).

All other arguments of the defendants in case No. 824 under their Point I are fully answered in Point I of the opposing brief in No. 823.

II.

The District Court and the Circuit Court of Appeals correctly held that the complaint made a sufficient showing that the requisite jurisdictional amount is involved.

The Record shows that plaintiff acquired its $20,000 of debentures about September 1, 1930 for approximately par and owned them continuously thereafter (R. 6, 243). The complaint contains a formal allegation of jurisdictional amount (R. 3). No question as to jurisdictional amount was ever raised in any of the motions to dismiss the complaint filed by any of the defendants (R. 17-38). It was raised in the Circuit Court of Appeals and in this Court for the first time. The complaint shows that the suit was brought in behalf of $23,233,000 of debenture holders (R. 6), who, in addition to the claim based on wrongful dividends, claimed equal and ratable security in $12,000,000 of collateral pledged to banks for loans of $15,000,000 (R. 8). Those facts alone disclose that more than $3,000 is involved in the suit.

The defendants persist in arguing (p. 19) that the complaint must allege sufficient evidentiary facts in addition to and in support of the general allegation to prove that the matter in controversy exceeds $3,000. That is not the law. The cases cited by defendants either are not in point or they support our position.

In the first case cited by plaintiffs, *Smith* v. *McCullough*, 270 U. S. 456, the court amended the complaint in order

to have it include necessary jurisdictional facts appearing elsewhere in the Record.

In the next case cited by defendants, *Mutual Life Insurance Co.* v. *Thompson,* 27 F. (2d) 753, the court allowed an amendment to clarify the allegation as to jurisdictional amount and said (p. 755):

> "However, federal jurisdiction, in a case of this kind, is not necessarily defeated by even an impossibility of arriving at the exact value, or by difficulty in approximating the value, of the object sought by the bill. If this object has a pecuniary value, and if that value could exceed $3,000, the court cannot, on motion to dismiss, refuse to accept as true an allegation that the value of the object sought exceeds the jurisdictional minimum."

Defendants then cite the case of *Woods* v. *Thompson,* 14 F. (2d) 951 (C. C. A. 7), for the proposition that "it is not enough that a complaint contain a formal allegation of jurisdictional amount" (defendants' brief, p. 19). The court's complete statement indicates under what circumstances the formal allegation is not enough (p. 952):

> "The general allegation that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000, is not controlling. If the particular averments of the complaints disclose the contrary, the general averment is of no avail."

There are no averments in the complaint in the instant case which disclose that less than $3,000 is involved.

In *Norton* v. *Larney,* 266 U. S. 511, another case cited by defendants, no question of jurisdictional amount was involved, but the case is helpful to us because the court itself amended the complaint to include jurisdictional facts appearing elsewhere in the Record. *Hanford* v. *Davies,* 163 U. S. 273, does not involve any question of jurisdictional amount. In *Wolfe* v. *Hartford L. & A. Ins. Co.,* 148 U. S. 389, the plaintiff alleged in his complaint that

he was a "resident" of New York, but no evidence as to his citizenship was introduced at the trial and his citizenship was nowhere disclosed by the record. The court said:

> "It is essential in cases where the jurisdiction depends upon the citizenship of the parties that such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or should appear with equal distinctness in other parts of the record."

The court in the last case cited above reversed the cause for further proceedings and the above-quoted language makes it clear that if the facts as to jurisdiction are not alleged with sufficient detail in the complaint, such deficiency will be cured if the jurisdictional facts are furnished during the trial or appear elsewhere in the Record.

In *Lion Bonding Co.* v. *Karatz*, 262 U. S. 77, the complaint on its face showed that less than the jurisdictional amount was involved and consequently the general allegation that the jurisdictional amount was involved was contradicted. This is made clear by the following statements by the court (pp. 85-6):

> "The facts specifically stated show that the amount in controversy was less than $3,000. Plaintiff's claim against the company was $2,100. * * * Since the bill in this case discloses that the amount in controversy was less than the jurisdictional amount, the general allegation that it exceeds this amount is, therefore, of no avail."

In *Pianta* v. *Reich Co.*, 77 F. (2d) 888, the complaint again showed on its face that the plaintiff's claim was for less than the jurisdictional amount. The court said (p. 890):

> "We turn now to the appellant's attack upon the jurisdiction of the District Court. The complaint in the receivership action showed on its face that the plaintiff's claim was for only $600."

The defendants reargue (p. 20) their theory that the debenture holders are entitled to no relief unless they owned their debentures on the dates when the dividends were improperly declared and paid. This is a matter of defense which would have no relation to the question of whether or not the complaint contains sufficient allegations to show that the jurisdictional amount of $3,000 is involved. However, in the case of *Woolverton* v. *Taylor*, 132 Ill. 197, the Court held that the directors were liable under the statute to all of the creditors of the corporation regardless of when they acquired their claims and said (p. 212):

> "The officers, if liable at all, are liable to all the creditors of the corporation,—those existing prior to the contract creating the excessive indebtedness, those whose debts are created thereby, and also those who may afterwards become its creditors."

The law is clear that so long as the complaint alleges in good faith that more than $3,000 is involved, it need not allege the evidence to prove the nature and extent of the damages. It is only when the allegations in the complaint make it clear to a legal certainty that the claim is actually for less than the jurisdictional amount that the general allegation of jurisdictional amount will be disregarded. The defendants can point to no allegations in the complaint making it clear to a legal certainty that the plaintiffs in this suit cannot recover more than $3,000. The rule has been recently repeated in *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283 (pp. 288-9):

> "The rule governing dismissal for want of jurisdiction in cases brought in the Federal Court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

In *General Pet. Corp.* v. *Beanblossom,* 47 Fed. (2d) 826 (C. C. A. 9), the plaintiff sued to enjoin the breach of a lease and the court said (p. 828):

> "The jurisdictional averments in this case were a diversity of citizenship, and that the value of the leasehold and leasehold rights, and the matter in controversy, exceeds, exclusive of interest and costs, the sum or value of $3,000. This general averment was, in our opinion, sufficient as against a motion to dismiss."

In *Kline* v. *Wright,* 42 Fed. (2d) 927 (D. C. D. Idaho), the court said (p. 928):

> "The test is that the record must create a legal certainty of want of jurisdictional amount before the court would be warranted in holding that it did not have jurisdiction."

Hence, the positive allegation in the complaint that "the matter in dispute herein, exclusive of interest and costs, exceeds the sum of $3,000" must control as a sufficient allegation to base jurisdiction (R. 3).

In addition, the amendments to the complaint, which the Circuit Court of Appeals has ordered should be filed, certainly contain sufficient allegations in respect to the amount of dividends, and the time of their declaration and payment, to satisfy anyone (R. 301-306). Reference is hereby made to our answer filed to the defendants' cross-petition for writ of certiorari in Case No. 823 in which the authorities are cited for the proposition that insufficient allegations in the complaint may be cured by amendment.

The conclusion is inescapable that the District Court and the Circuit Court of Appeals were correct in refusing to dismiss this suit for the alleged lack of sufficient allegations in respect to jurisdictional amount.

ARGUMENT AS TO FIELD v. DE MET'S, NO. 827.

Petitioner Field attempts to argue that he stands on an entirely different basis from any other party. It appears, however, that not only was he one of the directors of Corporation Securities Co. from June, 1930 until the bankruptcy of the company (R. 5-6) but also that he was a director of other Insull companies and fully acquainted with the affairs of all the Insull companies (R. 74, Par. 22). In the proffered amendments (R. 301-306) the participation of Stanley Field in declaring or assenting to the dividends here involved, is stated in detail. While he was not a member of the Executive Committee, he was one of the directors who participated in the appointment of members of that Committee and authorized them to declare dividends (R. 305), and thereby the Executive Committee became his agent. Furthermore, he was among those who ratified, confirmed and approved dividends declared by the Executive Committee (R. 301-305).

The decision in *Howard* v. *Insull,* 294 Ill. App. 20, has no bearing whatever on the liability of petitioner Stanley Field, under Section 23 of the Illinois Corporation Act, as that question was not involved in the Illinois Appellate Court case. Therefore, the essential integrity of the conduct of Stanley Field deducible from that decision by reason of the failure of the complaint in that case to charge Field with fraud, is totally irrelevant to the case at bar.

It therefore appears that Stanley Field stands in no different position than any other defendant in respect to his liability under Section 23 of the Illinois Corporation Act of 1919.

A.

The complaint adequately alleges knowledge by all defendants of the financial condition of Corporation Securities Company.

The argument of petitioner, Stanley Field, is fully answered in sub-division D of Point I of the opposing brief in case No. 823, which is hereby adopted.

The case of *White-Wilson-Drew Co.* v. *Lyon-Radcliff Co.*, 268 Fed. 525, is inapplicable here because in that case the complaint on its face showed that the directors had no knowledge of the wrongful acts; whereas the contrary appears in the complaint here (R. 13). It should also be noted that in the 1872 statute involved in that case "assenting" was a prerequisite to liability, whereas the 1919 statute imposes liability for "declaring or assenting."

B.

The allegation that dividends were declared in the first instance by the Executive Committee and thereafter ratified by the Board of Directors does not relieve the defendants from liability therefor.

The argument of petitioner Field on this point is fully answered in sub-division B of Point I of the opposing brief in case No. 823, which is hereby adopted.

Conclusion.

The defendants' cross-petition and the petition by the defendant, Field, fail to furnish any reason for the review by this Court of that portion of the judgment of the Circuit Court of Appeals which is in favor of the plaintiffs. The portion of the judgment under attack is not final and this

Court should not burden itself with the review of preliminary matters which may become moot before the case is ended, as is pointed out in the introductory argument in the brief of cross-respondents in case No. 823. Moreover, the judgment is not in conflict with the applicable decisions of the State and Federal Courts.

For all of these reasons respondents urge that the cross-petition and the petition for certiorari in these two cases be denied.

Respectfully submitted,

EDMUND D. ADCOCK,
LEWIS F. JACOBSON,
ROGER Q. WHITE,
GEORGE F. CALLAGHAN,
ALBERT W. FROEHDE,
Counsel for Respondents.